EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 1808

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ANDREW ANDERSON, A. ANDERSON COMPANY (a Corporation), JOHN J. BEATON, ANGUS BEATON, EDWARD CARLSEN, HARRY F. CHASE, MALCOLM P. CHASE, L. CHASE, SAMUEL B. CHASE, MARY L. CHASE, WM. B. CHASE, JR., DOROTHY M. CHASE, FRED. J. CHASE, GEORGE BOOLE (a Corporation), MRS. E. G. BOOLE, HENRIETTA W. HOBBS, E. W. HOBBS, CLARENCE W. HOBBS, EDWARD HENRIX, MARGARET J. WALL, MARION B. WALDRON and HENRY NELSON, Libelants,

Appellants,

vs.

J. J. MOORE & COMPANY (a Corporation),

Appellee.

APOSTLES ON APPEAL.

Upon Appeal from the United States District Court for the Northern District of California.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

Rules of U. S. Circuit Court
595

No. 1808

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ANDREW ANDERSON, A. ANDERSON COMPANY (a Corporation), JOHN J. BEATON, ANGUS BEATON, EDWARD CARLSEN, HARRY F. CHASE, MALCOLM P. CHASE, L. CHASE, SAMUEL B. CHASE, MARY L. CHASE, WM. B. CHASE, JR., DOROTHY M. CHASE, FRED. J. CHASE, GEORGE BOOLE (a Corporation), MRS. E. G. BOOLE, HENRIETTA W. HOBBS, E. W. HOBBS, CLARENCE W. HOBBS, EDWARD HENRIX, MARGARET J. WALL, MARION B. WALDRON and HENRY NELSON, Libelants,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Designation and Stipulation Under Rule 23.]

United States Circuit Court of Appeals for the Ninth Circuit.

IN ADMIRALTY.—No. 1808.

ANDREW ANDERSON et al.,

Libellants and Appellants,

vs.

J. J. MOORE & CO. (a Corporation),

Respondent and Appellee.

DESIGNATION OF PARTS OF CERTIFIED RECORD TO BE PRINTED.

The appellants in the above appeal intend to rely on the hearing thereof upon the whole of the errors shown by their assignment of errors therein, and designate the following parts of the certified record as the parts they think necessary for the consideration of such errors, to wit:

The whole of such certified record excepting only pages 1, 2, 3, 4, 18, 20, 21, 22 and 113 thereof.

The whole of the exhibits excepting only page 2 of Libellants' Exhibit "H."

Omit printing the caption of each paper excepting only the first and insert in the place of such caption "Title of Court and Cause."

H. W. HUTTON,
Proctor for Appellants.

It is hereby stipulated and agreed that the certified record in the above appeal was filed in time and that

the clerk of said Court need not print the orders extending the time in which said record should be filed.

Dated January 10th, 1910.

H. W. HUTTON,
Proctor for Appellants.
WILLIAM DENMAN,
Proctor for Appellee.

[Endorsed]: No. 1808. In the United States Circuit Court of Appeals for the Ninth Circuit. In Admiralty. Andrew Anderson et al., Libellants, and Appellants, vs. J. J. Moore & Co., Respondents and Appellee. Designation of Parts of Record to be Printed. Copy received this —— day of January, 1910. ————, Proctor for Appellee. Filed Jan. 12, 1910. F. D. Monckton, Clerk. H. W. Hutton, 527-529 Pacific Building, San Francisco, Cal., Proctor for Appellants.

In the District Court of the United States, in and for the Northern District of California.

IN ADMIRALTY.

ANDREW ANDERSON, A. ANDERSON CO. (a Corporation), JOHN J. BEATON, ANGUS BEATON, EDWARD CARLSEN, HARRY F. CHASE, MALCOLM P. CHASE, L. CHASE, SAMUEL B. CHASE, MARY L. CHASE, WM. B. CHASE, Junior, DORTHY M. CHASE, FRED J. CHASE, GEORGE BOOLE (a Corporation), Mrs. E. G. BOOLE, HENRIETTA W. HOBBS, E. W. HOBBS, CLARENCE W. HOBBS, EDWARD HENRIX, MARGARET J. WALL, MARION B. WALDRON, and HENRY NELSON,

Libellants,

vs.

J. J. MOORE & CO. (a Corporation),

Defendant.

Libel.

To the Honorable J. J. DE HAVEN, Judge of said Court:

The libel of the above-named libellants, of said district, ship-owners, against the above-named defendant, also of said district, merchant, to wit, a mercantile corporation in a cause of extended freight, to wit, demurrage, alleges as follows:

I.

That on all of the dates and times herein men-

tioned libellants A. Anderson Co., George Boole, and the defendant were and now are corporations organized and existing under and by virtue of the laws of the State of California, each thereof having its office and principal place of business in the City and County of San Francisco, said State.

II.

That on all of the dates and times herein mentioned the libellants above named were and now are the owners and operators of the American ship "Columbia," which said vessel is and was of 1327 net register tonnage.

III.

That on all of said dates and times libellant Henry Nelson was and now is the managing owner of said vessel, and as such managing owner was and now is the agent of all the other owners thereof in respect to the operation of said vessel.

IV.

That on the 26th day of June, 1907, at the City and County of San Francisco, in the State of California, the said defendant herein and the said Henry Nelson made, executed and delivered each to the other a charter-party in writing, wherein and whereby the said defendant chartered the said ship "Columbia" to proceed from San Pedro, in the State of California, where the said vessel then was, to Newcastle, Australia, there to load coal and return to San Francisco, in the State of California, to discharge the said coal.

V.

That the said charter-party was signed by the said

Henry Nelson in and by his own name, but in executing the same he did so as agent of all of the other libellants herein, and for their use and benefit, as well as for his own use and benefit, and also as managing owner of the said vessel for the use and benefit of all of her owners.

VI.

That pursuant to said charter-party and under the same the said vessel left the said San Pedro for said Newcastle where she arrived in due time, and there loaded a cargo of coal under said charter-party and for defendant's account and returned therefrom to California, and arrived in the port of San Francisco with all of said cargo of coal on board, the same consisting of two thousand two hundred and twenty tons, of 2240 pounds each.

V.

That contained within said charter-party was a stipulation and condition in the following terms in substance, to wit: That the said cargo should be discharged from said vessel in such customary berth as consignees shall direct, ship always being afloat and at the average rate of not less than one hundred and fifty tons per day on weather working days, Sundays and holidays excepted, to commence when ship was ready to discharge, and notice thereof given to said defendant in writing, and that if said vessel was detained over such days, demurrage was to be paid to libellants by said charterer at the rate of three pence English money per registered ton of said vessel per day.

VI.

That notice of the readiness of said vessel to discharge was given to the said defendant by libellants on the 15th day of January, 1908, at twelve o'clock noon, the said vessel then being, and ever since has been, ready to discharge, but no berth has been provided for that purpose by any one, nor can the libellants find any place where to discharge said vessel, and no cargo has yet been discharged from said vessel.

VII.

That the following were working days and days upon which coal was actually and generally discharged from vessels laden therewith in the port of said San Francisco, since the said notice was given, to wit: January the 15th, the 17th, the 20th for 2/3rds of said day; the 21st, the 22d, the 23d for one-half of that day; the 24th, the 25th for one-half of that day; the 27th, the 29th for one-half of that day; the 30th, the 31st, and on the following days in the month of February, 1908, the 3d, the 4th, for one-half of that day; the 5th, the 6th, and the 7th, and the days in which such cargo should have been completely discharged under said charter expired on the 7th day of February, 1908, at the hour of ten o'clock in the forenoon, a working day in the port of said San Francisco being from 7 A. M. to 12 noon, and from 1 P. M. to 5 P. M.

VIII.

That by reason of the premises said defendant has become indebted to the libellants in the sum of $1,008.26 for the detention of said vessel, from and

including the 7th day of February, 1908, up to and including the 19th day of February, 1908, the said detention commencing on the said 7th day of February, 1908, at the hour of ten o'clock in the forenoon, and it was further stipulated in said charter-party that exchange should be computed at $4.80 to one pound sterling money.

IX.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

Wherefore, libellants pray that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said defendant, and that it may therein be cited to appear and answer under oath all and singular the premises aforesaid, and that this Honorable Court will be pleased to decree the payment of the said extended freight aforesaid with costs and interest, and that libellants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

[Seal] HENRY NELSON,
For Self and Co., Libelants.

Subscribed and sworn to before me this 20th day of Febry., 1908.

JOHN FOUGA,
Deputy Clerk U. S. District Court, Northern District of California.

H. W. HUTTON,
Proctor for Libelants.

[Endorsed]: Filed Feb. 20, 1908. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

[Notice of Motion for Leave to Amend Libel, to File a Supplemental Libel, etc.]

[Title of Court and Cause.]

The defendant above named and its proctor will please take notice that libellants will move the above court, at the courtroom thereof, United States Post-office Building, at the corner of Seventh and Mission Street, in the City and County of San Francisco, State of California, on Saturday, the 24th day of October, A. D. 1908, at the opening of said court, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order of said court allowing the libellants to amend their libel on file herein by inserting therein, the matter attached hereto marked exhibit "A." And also for an order of said Court allowing libellants to file a supplemental libel, a copy of which proposed supplemental libel is attached hereto marked exhibit "B." Each of said motions will be based upon the grounds that in order to allow the libellants to present their whole case to the court, it is necessary to amend their libel, and to file said supplemental libel and on the hearing of said motions, said libellants will read this notice of motion, and the papers and files herein.

You are further notified that in the event the Court grants said motions or either thereof, said libellants will ask leave to file the said amendments

and supplemental libel, with the signature and verification of but one of said libellants.

Yours etc.,

H. W. HUTTON,
Proctor for Libellants.

EXHIBIT "A."

[Proposed Amendments to the Libel.]

[Title of Court and Cause.]

Now comes the libellants above named, and by leave of the Court first had and obtained, file the following amendments to their libel on file herein, and amend said libel in the following particulars:

I.

By inserting at the close of paragraph "VI" of said charter-party the following matters.

VIa.

That contained within said charter-party was a stipulation that the captain of said vessel should sign bills of lading for the cargo so taken on board without prejudice to said charter-party, but at no less than chartered rates, and upon the lading of said cargo on board as aforesaid there was presented to H. Larson, who was then and there the master of said vessel "Columbia," by Messrs. Davis & Fehon, Ltd., who as libellants are informed and believe and so aver were then and there the agents of said defendant J. J. Moore & Co., for that purpose, three certain bills of lading in like *tenure* with each other for the signature of the said master, and he thereupon, as master of said vessel, signed the whole

thereof, the said bills of lading being in the words and figures following, to wit:

"DAVIS & FEHON, Limited, Merchants and Shipping Agents.

60 Margaret St., Sydney, and at 375 Flinders Lane Melbourne.

SHIPPED in good order and condition by DAVIS & FEHON, LTD., on board the good ship or vessel called the "Columbia," whereof H. Larson is master for the present voyage, and now riding at anchor in the harbor at Newcastle and bound for San Francisco.

Two thousand two hundred and twenty tons of coal.

Clause Paramount.

2220 tons of Coal. (ten) tons coal on board for Ship's use, exclusive of cargo.

This Bill of Lading is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea Carriage of Goods Act 1904 had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof, and is issued subject to all the terms and provisions of and to all the exemptions from liability contained in such act, being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the aforesaid Port of San Francisco (The Act of God, the King's Enemies, fire, and all and every other dangers and accidents of the Seas, Rivers and Navigation, of whatever nature and kind, soever excepted), unto order or to their assigns, he or they

paying Freight for the said Goods and all other clauses and conditions as per Charter-party.

Average according to York-Antwerp Rules, 1890. In witness whereof the Master or Purser of the said ship or vessel hath affirmed to three Bills of Lading, all of this tenor and date, the one of which three Bills being accomplished, the others to stand void.

Weight and contents unknown.

Dated in Newcastle, 18th October, 1907.

H. LARSON.

That as libellants are informed and believe, and so aver, the said Davies & Fehon, Limited, wrote their name upon the back of one of said bills of lading, and delivered the same with their name so written upon the back thereof, prior to the arrival of said vessel "Columbia" in the port of San Francisco, on her return voyage to San Francisco. And upon their information and belief, libellants further allege, that the defendant herein was the consignee of said cargo of coal at said port of San Francisco.

Libellants further allege that the defendant herein paid the freight money for the said cargo of coal, and they received all discharging orders for said vessel at said San Francisco from said defendant.

H. W. HUTTON,
Proctor for Libellants.

[Proposed Supplemental Libel.]

[Title of Court and Cause.]

To the Honorable J. J. DE HAVEN, Judge of the Above-named Court.

The supplemental libel of the libellants in the above cause against J. J. Moore & Co., a Corporation, in a cause of demurrage (extended freight) respectfully shows as follows:

I.

Libellants especially refer to and make a part hereof all the allegations of their libel and all the amendments thereto.

II.

Libellants further allege, that after the filing of their libel herein, the said ship "Columbia" was further detained by the said defendant, with the said cargo of coal on board, and the said defendant failed to provide any place of discharge of said coal until on or about the 12th day of March, 1908, and as soon as a place for the discharge of said coal was provided for such discharge by the said defendant, the said coal was thereupon, and as quickly as possible, discharged therefrom, and the whole of said coal was finally discharged under the orders of said defendant, at twelve o'clock noon of the 19th day of March, 1908, at which time she had been detained by said defendant over and above the lay days provided for in said charter-party, a total of forty-one days.

III.

That by reason of the premises libellants are

entitled to have and recover of the defendant forty-one days' demurrage for said vessel at the rate of seventy-nine and 62/100 ($79.62) dollars per day, or a total of three thousand two hundred and sixty-four and 42/100 ($3264.42) dollars, with interest.

Wherefore libellants pray that defendant above named may be required to *answer oath* all and singular the premises aforesaid, and that libellants may have judgment against the defendant for the sum of three thousand two hundred and sixty-four and 42/100 ($3,264.42) dollars and interest and costs.

Libellants further pray for general relief.

H. W. HUTTON,
Proctor for Libellants.

Copy received this 20th day of October, 1908.

WILLIAM DENMAN,
Proctor for Defendant.

[Endorsed]: Filed Oct. 22, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Order Granting Motion to Amend the Libel.]

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the Courtroom thereof, in the City and County of San Francisco, on Saturday, the 24th day of October, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,767.

ANDREW ANDERSON et al.

vs.

J. J. MOORE & CO.

On motion of H. W. Hutton, Esqr., proctor for libelants, by the Court ordered that the motion to amend the libel herein be, and the same is hereby granted in accordance with the stipulation on file herein.

[Stipulation Concerning the Amendment to the Libel and the Supplemental Libel.]

[Title of Court and Cause.]

It is hereby stipulated by and between the parties hereto:

I.

That the amendment to the libel heretofore filed herein, proposing to insert paragraph 6a after paragraph 6 of said libel, *may filed* herein without verification, and that all the allegations thereof are ad-

mitted, save the allegation that Messrs. Davies & Fehon, Limited, were at any of the times in said amendment mentioned agents of defendant J. J. Moore & Co.

II.

That the proposed supplemental libel of libelants may be filed herein without verification, and that all the allegations therein contained shall be deemed at the trial of the said cause to have been duly denied and placed in issue by answer.

H. W. HUTTON,
Proctor for Libelants.
WILLIAM DENMAN,
Attorney for Defendant.

[Endorsed]: Filed October 24, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Title of Court and Cause.]

Exceptions to Libel.

Now comes the respondent, J. J. Moore & Company, and excepts to the libel of libelants on file herein on the ground that the said libel states a cause of action arising from a contract in writing, and that the said libel fails to set forth the said contract in writing.

Wherefore, respondent prays that libelants be compelled to amend their libel and set forth the said contract, or that the respondent be hence dismissed with its costs of suit herein.

WILLIAM DENMAN,
Proctor for Respondent.

Service of the above is hereby admitted this 9th day of March, 1908.

H. W. HUTTON,
Proctor for Libelant.

[Endorsed]: Filed Mch. 10, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Order Overruling the Exceptions to the Libel, etc.]

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 29th day of May ———, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,767.

HENRY NELSON, et al.

vs.

J. J. MOORE & CO.

The exceptions to the Libel herein, having been heretofore submitted to the Court for decision, now after due consideration had thereon, by the Court ordered that said exceptions be, and the same are hereby overruled, and the respondent be, and it is hereby allowed ten days in which to file its answer.

[Title of Court and Cause.]

Answer.

To the Honorable JOHN J. DE HAVEN, Judge of the United States District Court, Northern District of California.

Now comes the respondent, and answering the libel of libelants on file herein, admits and denies as follows:

I.

Answering Article 11 of said Libel, respondent alleges that it has no information or belief on the subject sufficient to enable it to answer the same, and basing its denial on that ground, denies *that all* of the dates and times, or any of them, mentioned in the said libel, libelants were the owners and operators, or owners or operators, of the American ship "Columbia," or that the said vessel was of Thirteen Hundred and Twenty-seven (1327) net register tonnage; and on the said ground denies that on all of said dates, or any of them, libelant Henry Nelson was the managing owner of the said vessel, or that he was the agent of all or any of the other owners therein in respect to the operation of the said vessel, or at all.

II.

Answering Articles IV, V, VI and VII (erroneously marked Article V) of said libel, respondent denies that it entered into any contract chartering the said vessel the "Columbia," other than that certain written charter-party, *excluded* and delivered

mutually by the libelants and the defendant in duplicate copies, a copy whereof is hereunto annexed, marked Exhibit "A", and hereby made a part hereof. That by the terms of the said contract it was provided as follows: The said vessel "to be discharged as customary in such customary berth or place as consigned shall direct, at the average rate of not less than 150 tons per weather working days, Sundays and holidays excepted, to commence when the ship is ready to discharge and notice thereof has been given by the captain in writing. For detention over and above said laying days, demurrage to be at 3rd per register ton "per day." Respondent denies that the said vessel was on the 15th day of January, 1908, at 12:00 o'clock, noon, or any time prior to the commencement of this action, ready to discharge the said vessel, and denies that no berth has been provided for that purpose by anyone; and in that behalf alleges that on or about the 15th day of January, 1908, respondent did notify libelant, and did direct the discharge of the said vessel at the dock of the Western Fuel Company, a customary berth or place inside the Golden Gate and in the said port for the discharge of such cargo; that it is the *custom method* of discharging in the port of San Francisco and the custom of the said port, that where a vessel has been directed by the consignee to go to a dock provided for in the charter party, and the said vessel is unable to reach the said dock by reason of the presence at the said dock, filling the same, of vessels which have been ready to discharge prior to the vessel in question, said vessel shall await its turn to

discharge at the said dock, until the vessels designated for discharge, or intended for discharge, at the said dock, which have been ready to discharge prior to the said vessel, shall have been discharged thereat. That the said Western Fuel dock was a safe wharf or place in the said city and county at which said vessel could always lie afloat.

III.

Answer Article X of the said libel (erroneously marked Article VIII) respondent denies that by reason of the premises, or at all, it became indebted to libelants in the sum of One Thousand Eight and 26/100 Dollars ($1,008.26), or in any sum whatsoever, for the detention of the said vessel for any time whatsoever.

IV.

Answering Article XI (erroneously marked Article IX) of the said libel, respondent admits that whatever of the said libel be true is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, but denies that the premises therein contained are true otherwise than as admitted by this answer.

Wherefore, respondent prays that libelants take nothing by reason of this action, and that respondent have judgment for its costs of suit incurred herein.

WILLIAM DENMAN,
Proctor for Respondent.

State of California,
City and County of San Francisco,—ss.

J. J. Moore, being first duly sworn, deposes and says: That he is an officer of the respondent corporation, namely, President thereof; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

J. J. MOORE.

Subscribed and sworn to before me this 15th day of July, 1908.

[Seal] CEDA de ZALDO.

Notary Public in and for the City and County of San Francisco, State of California.

Exhibit "A" [to the Answer].

J. J. MOORE & CO.,
San Francisco,

COAL.

San Francisco, Cal., June 26, 1907.

THIS CHARTER-PARTY, this day made and concluded BETWEEN Henry Nelson, Managing Owner of the good Ship or vessel called the Am. Str. "Columbia," measuring 1327 tons register or thereabouts, now at San Pedro, Cal., and J. J. Moore & Co., of San Francisco, Merchants and Charterers,

That the said ship, being tight, staunch and strong, and every way fitted for the voyage, shall with all possible despatch proceed to Newcastle (NSW.),

Australia, and there load in the usual and customary manner a full and complete cargo of Coal from such Colliery as Charterers or their agents may direct, which said Merchants bind themselves to ship, to be brought to and taken from alongside at the merchants' risk and expense, not exceeding what she can reasonably stow and carry over and above her Tackle, Apparel, Provisions and Furniture.

In the event of the vessel being in difficulty or putting into any port for any purpose whatever, the Captain to inform charterers by telegram, and the vessel to consign to charterers' agent there.

The Captain to take a sufficient quantity of coal on board at Port of Loading for ship's use for the Voyage, say not less than ten tons, to be supplied at current rate, such quantity to be endorsed on *Bill Lading*, all on board to be delivered with the exception of such stores as remain unused; and being so loaded shall therewith proceed to San Francisco harbor, Cal., to discharge at any safe wharf or place within the Golden Gate and deliver the said full and complete cargo in the usual and customary manner, at any safe wharf or place or into Craft alongside as directed by Consignees.

Freight for the said Cargo to be paid on final discharge at the rate of (22.-) Twenty-two shillings sterling per ton of 2240 lbs. on the quantity delivered, or upon the quantiy as per Bill of Lading, and Pit Certificate, at Consignees' option, to be declared before breaking bulk.

(The Act of God, the King's Enemies, Perils of the Sea, Fire, Barratry of the Master and Crew, Ene-

mies, Pirates, Thieves, Arrest and Restraint of Princes, Rules and People, Loss or Damage from Fire on Board, in Hull, on Craft, or on Shore; Collisions; Stranding and other accidents of navigation excepted, even when occasioned by the negligence, default or error in judgment of the Pilot, Master Mariners, or other Servants of the Ship-owners. Frost or Floods, Fire, Strikes, Lockouts, or Accidents at the Colliery directed, or on Railways, or any other hindrance of what nature soever beyond the Charterers' or their agents' Control, throughout this Charter, always excepted.)

All Port Charges, Pilotages, Wharfage Dues and Charges, at ports of loading and discharge, and half-cost of weighing at Port of Discharge, if incurred, to be paid by ship as customary.

Should vessel be free from wharfage during Discharge the above freight to be reduced by 4½d per ton.

Payment of Freight to be made as follows: On right and true delivery of cargo in Golden Coin at the Exchange of $4.80 to the £ sterling.

The Captain to sign Bills of Lading without prejudice to this Charter-party, but at no less than chartered rates. Charterers' responsibility to cease on cargo being loaded. Owners to have lien on cargo for freight and demurrage. General Average, if any, as per York-Antwerp Rules of 1890,

Extra Insurance, if any over and above Two and One-half (2½%) per cent to be paid by Vessel.

To be Discharged as customary, in such customary berth as consignees shall direct, ship being always afloat, and at the average rate of not less that 150

tons per weather working day (Sundays and holidays excepted), to commence when the ship is ready to discharge, and notice thereof has been given by the Captain in Writing; If detained over and above the said laying days, demurrage to be at 3d. per register ton per day.

Charterers have the option of moving Vessel during discharge, they paying cost of Towage; if more than one move is required. The vessel to be consigned inwards to charterers, or their Agents, at Port of Discharge, paying them (5) five per cent Commission on the Total Inward Freight.

Should the vessel not arrive at Newcastle, N.S.W., on or before sundown on the 15th of November, 1907, Charterers to have the option of canceling this Charter-Party.

Ship to employ Charterers' Stevedore to take in, trim, and discharge coal, paying current rate for same.

Captain will receive loading instructions from Davies & Fehon, Sydney (through R. B. Wallace, Newcastle), whom the Owners hereby accept as Agents for the ship, and to be consigned to them free of commission, but paying /5s. O d. Agency Fee.

Penalty for non-performance of this agreement, estimated amount of Freight.

Lay days for loading not to exceed 20 working days

and to begin 24 hours after Captain has given written notice that vessel is ready to receive cargo.

HENRY NELSON.

Witness:

O. J. BEYFUSS.

Signed: J. J. MOORE & CO.,

J. J. MOORE, President.

Witness:

O. J. BEYFUSS.

[Endorsed]: Filed Jul. 16, 1908. Jas. Brown, Clerk. John Fouga, Deputy Clerk.

[Title of Court and Cause.]

Testimony Taken in Open Court.

Hon. J. J. DE HAVEN, Judge.

Wednesday, November 4th, 1908.—Monday, November 9th, 1908.

APPEARANCES:

H. W. HUTTON, ESQ., for Libelants.

WM. DENMAN, ESQ., for Claimant.

(This libel now came on for hearing in its regular order on the calendar and the following proceedings were had.)

[Statement by Mr. H. W. Hutton.]

Mr. HUTTON.—If your Honor please, the libellant is prepared to proceed, but it may be possible that after the testimony of the defendant is in, I shall have *at ask* for a continuance. I am ready to proceed as far as I can. I was not altogether certain about the meaning of Mr. Denman's motion. He

made a motion to set this case for immediate hearing. I did not understand it was coming up this morning. I have made such preparations as I have been able to since Monday. When the testimony that I have here to-day, Mr. Denman's testimony is through, it may be possible that I shall have to ask your Honor for a short continuance to get further information that I have been unable to procure between now and Monday. With that understanding I am ready to proceed.

The COURT.—Proceed with your case.

Mr. HUTTON.—Permit me to state the purpose of it. The action is one brought by the owners of the ship "Columbia" for demurrage under a charter-party. The libel sets forth the ownership of the ship, and the fact that the defendant is a corporation, and that about the 26th of June, 1906, the ship "Columbia," then lying at San Pedro, was chartered by the plaintiff for defendant for a voyage from there to Newcastle, Australia, to load coal and to return to San Francisco. That is practically not denied, except the ownership of the vessel, which they say they have no information about. We allege that the vessel went there and returned to San Francisco with a load of coal, arriving here on the 16th day of January, in the present year. The charter-party requires that notice shall be given to the charterer of the arrival of the vessel. We allege that was duly given, and that is not denied. It further specifies that the discharge shall be at the rate of 150 tons a day, and commence when notice of readiness of the ship is given. It was given on the 15th of January, as I

say. It further specifies that the demurrage shall be for any detention over the lay days; that the demurrage shall be at the rate of a specified sum a day.

The libel further alleges that the lay days of this vessel expired on the 7th of February, 1908, at 10 o'clock in the forenoon, but she was not unloaded until the 21st day of March, at 1 P. M., which we will show by evidence. She was detained 42 1/3 days over her lay days.

This suit was originally commenced during the running of those lay days and was for the demurrage that accrued up to the time of the filing of the libel. Subsequently by stipulation I filed a supplemental libel so that the whole matter could be tried in this case, and we claim the whole of the demurrage for the 42 1/3 lay days. There was also an amendment to the libel filed which is on file in this case. The charter-party calls for a bill of lading to be signed by the Master upon receipt of the cargo, and we allege that he signed them in triplicate, and one of them was endorsed by the alleged shipper of the coal, sent to the defendant and received by him. In that bill of lading there is a stipulation that the consignee is to pay all freight and all other clauses and conditions of the charter-party.

We further allege in this amendment that J. J. Moore & Co. received a copy of it which was endorsed, and that they were the consignees, which is not denied in the answer. Our contention is that they are liable for the 42 1/3 lay days. There is no copy of the charter-party attached to the libel, but Mr. Denman has attached one to his answer. (Addressing

counsel.) I call your attention, Mr. Denman, to the fact that you have made a mistake. You designate this vessel as a steamer in this copy. The vessel was a sailing vessel. That would be against you. With that exception it appears to be right.

[Testimony of H. Larsen, for the Libelant.]

H. LARSEN, called for the libellant, sworn.

Mr. HUTTON.—Q. You were the master of the American ship "Columbia," were you not, between June of last year, and March of this year.

A. Yes, sir.

Q. Do you remember going with a load of coal to Newcastle, and returning to San Francisco with a load of coal? A. Yes, sir.

Q. Do you remember what day you arrived in San Francisco? A. On the 14th of January.

Q. Of this present year? A. Yes, sir.

Q. On the next day did you visit the office of J. J. Moore & Co.? A. Yes, sir.

Q. Did you take any paper with you?

A. Yes, sir, I brought up a note that the ship was ready to discharge cargo.

Q. I show you a paper, and ask you if that is the paper that you took (handing)? A. Yes, sir.

Q. I call your attention to a stamp on top "Received January 15th, 1908, J. J. Moore & Co., 12 M.", with some initials underneath. I cannot designate them. I will ask you where that stamp was put upon that paper.

A. That stamp was put on in J. J. Moore's office. I asked them to put it on.

Q. And the paper was returned to you?

(Testimony of H. Larsen.)

A. Yes, sir.

Mr. DENMAN.—Q. Is that your signature?

A. No, sir, that is the Manager's Henry Nelson.

Q. Is he here this morning? A. Yes, sir.

Mr. HUTTON.—I offer that letter in evidence and ask to have it marked Libellant's Exhibit "A."

(The letter is marked Libellant's Exhibit "A.")

Mr. HUTTON.—These initials, I think you concede, are those of Mr. Mainland.

Mr. DENMAN.—I do not know whose the initials are, but that is our stand.

Mr. HUTTON.—Q. At this time was the ship "Columbia" ready to discharge, as far as the ship was concerned? A. Yes, sir.

Q. Nothing remained to be done but dock her?

A. Nothing remained to be done but dock the ship.

Q. At the time you delivered that paper did they designate to you any dock where you were to discharge? A. No, sir.

Q. Did you get any information at all at that time as to where you were to discharge?

A. I asked them where the ship was going to be discharged. They said they did not know, and furthermore they said there would not be anything done for three or four weeks to come.

Q. That is all the information you got?

A. Yes, sir.

Q. Do you remember what day you were finally discharged? A. On the 20th of March.

Q. At what hour of the day?

(Testimony of H. Larsen.)

A. About 1 o'clock. I could not say to a few minutes.

Q. During the whole of the time that the ship laid there up to the time you commenced to discharge her was she, as far as the ship was concerned, ready to discharge at all times? A. Yes, sir.

Cross-examination.

Mr. DENMAN.—Q. To whom did you present this paper?

A. I don't know the gentlemen's name in the office.

Q. Who was there at the time?

A. I don't know any of their names in there. I asked if J. J. Moore was there. I could not say exactly what he told me. He looked at the notice and accepted the notice, that was all.

Q. Where you alone at that time?

A. Yes, sir.

Q. No one with you?

A. No, sir, I was alone when I went in there.

Q. You had a conversation you say, but you do not recollect exactly what that conversation was?

A. Nothing more than what I stated a while ago, that they told me there would be nothing done for three or four weeks to come.

Q. What was the reason they gave for that?

Mr. HUTTON.—Objected to as assuming a fact not in evidence, and further that it is self-serving testimony.

The COURT.—I overrule the objection.

Mr. HUTTON.—I will take an exception.

(Testimony of H. Larsen.)

A. They told me there were too many ships ahead of me to discharge.

Mr. DENMAN.—Q. In the port?

A. Yes, sir.

Q. Did you during that period know of any dock that was free for the docking of your vessel?—during that time? A. No, sir.

Mr. HUTTON.—I object to that on the ground that the charter-party in this case requires and directs the owner of this vessel to unload where he is directed. It makes no difference what he heard unless he was told by the charterer where to dock.

The COURT.—He said he has not heard anything about it. Objection overruled.

Mr. HUTTON.—I will take exception.

Mr. DENMAN.—Q. The fact was there was a very heavy influx of shipping at that time, and the docks were all loaded. That is true, is it not?

Mr. HUTTON.—Objected to as immaterial, and further it was not incumbent on the master to find a dock, in this case.

The COURT.—Objection overruled.

Mr. HUTTON.—I will take an exception.

The COURT.—I will hear the evidence, and see what it is.

Mr. HUTTON.—Q. That is a fact, is it not?

A. I do not know. I did not go round the wharves to look. I got orders to wait from J. J. Moore. They told me they would let me know when to dock the ship.

(Testimony of H. Larsen.)

Mr. DENMAN.—Q. At that time it was a fact that this harbor was crowded with vessels, and it was exceedingly difficult to obtain docking facilities?

A. They told me so in the office. I did not look round.

Q. It was common talk on the water front?

Mr. HUTTON.—I object to that as hearsay testimony.

The COURT.—I think it would be. I think that could be proven by some one who knows it. The Captain says he does not know anything about it. He did not look round.

Mr. DENMAN.—Q. Where did you finally discharge? A. At Folsom Street.

Q. Whose dock is that?

A. The Western Fuel Company's dock.

Q. Is that a customary dock for discharging of coal cargoes?

A. Yes, sir. There are several bunkers there.

Q. That was a customary bunk, was it?

A. Yes, sir. There were five or six of them. That is the customary place to discharge coal at the bunkers.

Q. How long were you engaged in discharging the vessel after you got there?

A. I don't remember; I think about 2 days and a half.

Q. After your vessel was in dock did you have any conversation with J. J. Moore about discharging the vessel? A. No, sir.

(Testimony of H. Larsen.)

Q. Did you have any correspondence between yourself and J. J. Moore after the vessel was in dock that you know of? A. No, sir.

Q. How did you receive finally this notice that you were to go in and dock your vessel and discharge her?

A. I got notice from my managing owner. He got notice from J. J. Moore & Co.

Q. You do not know anything of your own knowledge regarding that transaction? A. No, sir.

Redirect Examination.

Mr. HUTTON.—Q. Do you know whether the steamer "J. A. Lunsmann" was in port at the time that you arrived here? A. No, sir.

Q. I ask you if you know. Do you say you do not know, or that she was not here?

A. She was not here then. I saw the captain afterwards when he came in.

Q. She arrived after you?

A. She arrived about a week after me.

Q. She loaded with coal from the same port that you came from? A. Yes, sir.

Q. Do you know whether she discharged before you did, or not, in San Francisco?

A. Yes, sir; she discharged before I did.

Q. Do you know how many days?

A. No, sir, that I could not tell you.

[Testimony of Henry Nelson, for the Libelant.]

HENRY NELSON, called for the libellant, sworn.

Mr. HUTTON.—Q. You were the managing owner of the ship "Columbia," and you are at present, and have been for a couple of years last past? A. Yes, sir.

Q. Who were the owners of that vessel between June, 1907, and say, the latter part of March, 1908?

A. I have got a list of the owners here, and I will read them off. Henry Nelson; Andrew Anderson; A. Anderson & Co.; Edward Carlsen; John J. Beaton; Henrietta N. Hobbs; Elvira W. Hobbs; Clarence W. Hobbs; Edward Henrix; Angus Beaton; George Boole & Co. (Inc.); Harry F. Chase; Malcom P. Chase; Samuel B. Chase; L. Chase; Mrs. Marion B. Walden; Margaret J. Wall; Mrs. E. G. Boole; Mary L. Chase; Wm. B. Chase, Jr.; Dorthy M. Chase; and Fred J. Chase.

Q. You signed the charter-party, did you not, about the month of May, or June, 1907, the one in issue in this case? A. I did.

Q. Did you sign it as managing owner on behalf of those owners that you mentioned?

A. As managing owner on behalf of the owners.

Q. What is the registered tonnage of the "Columbia"?

A. Her net tonnage is 1,327 tons and a fraction over.

Q. Net? A. Yes, sir.

Q. What is her gross registered tonnage?

(Testimony of Henry Nelson.)

A. 1,471.

Q. I show you a paper that is dated San Francisco, January the 18th, 1908, and ask you whether you ever saw that paper before (handing)?

A. I did.

Q. How many copies of that were made; that is, how many duplicates? A. Two.

Q. What became of the other one?

A. The other one was sent to J. J. Moore.

Q. By what method?

A. By the captain.

Q. No. I mean this particular paper that you have in your hand of January the 18th. How was that sent up?

A. This was sent up by mail—by registered mail.

Q. I show you the return postal, and ask you if that is the receipt that you got for the letter at the time that you sent it, and the return receipt on it?

A. That is the return receipt from J. J. Moore's office by mail.

Q. With respect to this paper. You enclosed one of these in an envelope addressed to J. J. Moore & Co. at what place?

A. Moore's office is on Pine Street.

Q. Did you register the letter?

A. Yes, sir.

Q. That is the return receipt?

A. That is the return receipt. I mailed the letter in the postoffice.

Mr. HUTTON.—I offer this as Libellant's Exhibit

(Testimony of Henry Nelson.)

"B." Do you wish me to put in this receipt, Mr. Denman. It only encumbers the record.

Mr. DENMAN.—No.

Mr. HUTTON.—You admit they got it on that day?

Mr. DENMAN.—I admit the letter was received.

Mr. HUTTON.—This is dated January the 18th. 1908.

(The letter is marked Libellant's Exhibit "B.")

Q. Between the 15th and 18th of January, 1908. did you call at the office of J. J. Moore & Co., with reference to the ship? A. I did.

Q. Whom did you see?

A. I saw Mr. J. J. Moore.

Q. How many times did you call?

A. I was there twice.

Q. Did you have any conversation with him?

A. I did.

Q. Just state what the conversation was?

A. I went up there to see him in regard to getting some money to disburse the crew. He promised me some, but he charged me too much interest, and I did not accept it. I went up and in the afternoon he sent for me. He wanted to know if he could make some arrangement whereby to keep the vessel for storage. I said I thought that could be arranged. He asked me what I would charge him for it. I told him I could not say unless I saw some of the balance of my owners. I told him that the ship "McLaren" was getting $200 a month and I did not feel inclined to let the vessel lay with a cargo of

(Testimony of Henry Nelson.)

coal in for that amount of money. He told me the "McLaren" was not getting that, but was only getting $100 a month. That ended the conversation. I told him I would not accept any such thing as that unless I saw the balance of my owners. I did interview some of my owners, and they thought they should be paid about $500 a month. I asked him $500 a month, and 90 per cent of the cargo money to be paid them. He said he would not pay no such thing. He said my vessel was not worth $500, and he would not pay that. I told him that ended the offer, and I would stand on the charter-party. That is about all the conversation I had with Mr. Moore.

Q. I show you a letter dated March the 16th, 1908, and ask you whether you ever saw that letter before (handing)? A. Yes, sir.

Mr. HUTTON.—It is admitted by Mr. Denman that this paper bears the signature of William Mainland, the Secretary of J. J. Moore & Co. I will offer this letter in evidence as Libellant's Exhibit "C." I would *like this* letter to your Honor (reading):

[Libelant's Exhibit "C" (Read in Evidence).]

"J. J. MOORE & CO.

Shipping and General Commission Merchants.

215-217 Pine Street.

San Francisco, Cal., March 16th, 1908.

Henry Nelson, Esq.,

Managing Owner Ship "Columbia,"

San Francisco, Cal.

Dear Sir: Will you please have the "Columbia" docked at the bulkhead berth alongside the Folsom

(Testimony of Henry Nelson.)

St. bunkers of the Western Fuel Co. on the tide which serves about 11 o'clock tomorrow morning and have everything in readiness to commence discharge as soon as the vessel is docked.

Yours faithfully,

J. J. MOORE & CO.

WM. MAINLAND,

Secretary."

(The letter is marked Libellant's Exhibit "C.")

Q. State whether or not that is the first notice you received of where to dock the "Columbia."

A. That was the first occasion.

Q. Were you ever told where the "Columbia" was to dock? A. No, sir.

Q. That is the first intimation that you got?

A. That is the first intimation that I got.

Q. With respect to the rainy days. You computed them during the time that the "Columbia" was lying here, did you not?

A. I did.

Q. When ought she to be discharged, according to your computation, excluding lay days, holidays, Sundays and nonworking days?

Mr. DENMAN.—One minute, Mr. Hutton.

Mr. HUTTON.—It is not denied in the answer.

Mr. DENMAN.—It calls for the conclusion of the witness.

The COURT.—He will probably give the details of it.

Mr. DENMAN.—If that is to be followed up I withdraw the objection.

(Testimony of Henry Nelson.)

Mr. HUTTON.—It is not denied in the answer. The libel alleges what the rainy days are, and there is no denial.

Mr. DENMAN.—Our stipulation covers that.

Mr. HUTTON.—No, it does not.

Q. What were the rainy days. When ought she to have been discharged?

A. She ought to have been discharged on the 7th of February.

Q. At what hour in the morning?

A. At 10 o'clock.

Q. And when was she finally discharged?

A. She was discharged on the 20th of March. about one o'clock.

Q. Pending this time, state whether or not you communicated with me about the matter, while the vessel was lying here?

Mr. DENMAN.—What is the purpose of that?

Mr. HUTTON.—To show I was authorized to communicate with J. J. Moore & Co., about it.

A. I did communicate with you, yes.

Q. After the 7th of February, did you communicate daily with the office of J. J. Moore & Co.?

A. I sent them a bill every day. The first bill I sent them there was 7 days demurrage due, and after that I sent them a bill every day until the vessel was finally discharged.

Q. Was the "Columbia" ready or not to be discharged during all those days, as far as the ship was concerned?

(Testimony of Henry Nelson.)

A. The ship was ready to discharge just as soon as she came into port.

Q. You have been master of the ship "Columbia" have you not?

A. Yes, sir, between 10 and 11 years.

Q. Who paid the freight money to you for this vessel? A. J. J. Moore & Co.

Q. That was after the coal was discharged?

A. That was after the coal was discharged.

Q. Has any of this demurrage been paid?

A. No, sir.

Q. At the time that you received this notice to discharge the "Columbia" was she docked, pursuant to the notice of March 16th, 1908?

A. I got the notice, and then they docked her the next day. I got the notice to be ready to dock the vessel the next morning at 11 o'clock, which we done.

Q. Then you docked her?

A. We docked her right off, as the letter said.

Q. How long have you been managing owner of the "Columbia"?

A. I have been managing owner of the "Columbia" since about December, or January, 1906.

Q. How many days was she detained?

A. She was detained here 42 days and one-third.

Cross-examination.

Mr. DENMAN.—Q. You have testified that in your opinion the vessel's lay days expired at a certain time. How do you come to that conclusion?

A. By reading the charter-party, what amount of

(Testimony of Henry Nelson.)

lay days she was entitled to and eliminating therefrom the holidays.

Q. Have you a list of them?

A. No, sir, I turned them in to Mr. Hutton.

Q. Can you recollect them? A. Yes, sir.

Q. Can you testify to them?

A. No, sir, because I do not carry all that in my head.

Q. You have no recollection of the days on which you base your conclusion that the lay days expired at a certain time?

A. I noted it down on a piece of paper, and turned it all over to Mr. Hutton.

Q. You cannot testify to that at this time?

A. Not from my recollection.

Mr. HUTTON.—I move to strike out the testimony, if your Honor please.

The COURT.—Let it go out.

Mr. HUTTON.—I will have to send to my office for the list, if your Honor please. I do not understand that is denied. Mr. Denman thinks it is.

Mr. DENMAN.—If it is not I shall move to amend so that it can go in.

Mr. HUTTON.—I will have to send to my office to get the information. I do not want to take any chances on that.

Mr. DENMAN.—Q. Do you know who finally got this coal?

A. Yes, sir, the Western Fuel Company, I presume. I don't know any more except it was discharged at its dock, that is all.

(Testimony of Henry Nelson.)

Q. Did you ever try to find any other dock to discharge this vessel at?

A. He told me he would let me know.

Q. Did you ever yourself try to find any dock to discharge this vessel at?

A. No, sir, I did not know where to go and look for a dock. I did not know where he wanted the coal.

Q. What was the condition of the Harbor at that time as to dockage facilities?

A. In what respect?

Q. Was the Harbor crowded, or was it free.

Mr. HUTTON.—I object to that on the ground that it is immaterial.

The COURT.—I will take the answer of the witness.

Mr. HUTTON.—I will take an exception.

A. I have seen the Harbor a great deal more crowded, and seen it not so crowded.

Mr. DENMAN.—Q. The fact is that every dock in the harbor at which you could have discharged was during that entire period filled with other vessels? A. There were lots of empty docks.

Q. There were lots of empty docks?

A. Yes, sir.

Q. Coal discharging docks?

A. I have discharged coal at all kinds of docks.

Q. What are the customary docks for the discharge of coal in San Francisco?

(Testimony of Henry Nelson.)

A. They discharge coal in bunkers and on open wharves. I have discharged lots of coal at open wharves.

Q. Are you carrying coal cargoes here continually right along, off and on?

A. I did carry coal cargoes here for about 12 or 13 years.

Q. How long ago?

A. About ten or 12 years ago.

Q. Do you know what the custom is of discharging, at the present time in the port?

A. They discharge at bunkers and at open wharves.

Q. Do you know the bunkers of the Western Fuel Company? A. Yes, sir.

Q. Are those customary places of discharge in San Francisco? A. I know the wharves.

Q. Are *they customary* places of discharge in San Francisco for coal cargoes?

A. Yes, sir, they discharge coal there.

Q. Where were you finally discharged?

A. At Folsom Street Bunker.

Q. That is a customary place for the discharge of coal?

A. That is one of the customary places.

Q. You cannot testify as to when your lay days expired. Do you know when your discharge began?

A. When we started in to discharge?

Q. Yes.

A. I could not tell you what time we started in to

(Testimony of Henry Nelson.)

discharge. The letter from J. J. Moore & Co. to me tells what day to commence discharging.

Q. That is the day after that was received?

A. Yes, sir.

Q. Where was the vessel lying until she finally was docked?

A. She was lying in the bay here.

Q. Whereabouts in the bay?

A. She was lying up off the 16th Street dock; somewhere in the neighborhood around there.

Q. What preparations were made to discharge her? A. What preparations were made?

Q. Yes.

A. The day after the vessel came in the yards were cock-billed, and the vessel made ready to discharge.

Q. How long did that condition continue?

A. That condition continued until she finally got discharged at the dock. There was not so very much to do to get the vessel ready.

Redirect Examination.

Mr. HUTTON.—Q. How many places are there in San Francisco, that is, docks where they do nothing but discharge coal?

A. Where they do nothing but discharge coal?

Q. Yes, that is exclusively set aside for the purpose of discharging coal.

A. There are six places that I know of.

Q. How many are there in Oakland?

A. Three, I think, that I can call off now.

Q. Please name those in San Francisco that you

(Testimony of Henry Nelson.)

know of, that is, where they do nothing but discharge coal.

A. There is one on Beal Street; one on Folsom Street; one on Howard Street; one on Mission Street; one on Vallejo Street; and one down at Green Street or Union Street—one of those two streets.

Q. State whether or not during the time that the "Columbia" was lying there, that is, from the 15th of January to the 20th of March, or to the 15th of March, I will say, whether there was ever any time when you noticed that some of those places were disengaged and no ship there?

A. Yes, sir, I saw several times there was no vessels at the bunkers.

Q. No ships at any of those places?

A. I do not say at all of them at the same time.

Q. There were times when there were no ships there?

A. I saw bunkers that were disengaged.

Q. Take Folsom Street wharf—that is one of the Western Fuel Company's wharves?

A. Yes, sir.

Q. During the time that the "Columbia" was lying idle did you ever see that place vacant?

A. I would not specify that particular bunker.

Q. Take the three, Folsom, Howard, and Mission. Those were the Western Fuel Company's berths?

A. Yes, sir.

Q. Did you ever see one of those places during that time with no ship at it at all?

A. Yes, sir.

(Testimony of Henry Nelson.)

Q. Frequently or otherwise?

A. I saw several times.

Q. That there was no vessel there?

A. That there was no vessel there.

Q. No vessel discharging? A. Yes, sir.

Recross-examination.

Mr. DENMAN.—Q. How long did these bunkers remain idle. In the first place, what bunker did you say was not occupied?

A. I would not specify the particular bunker I have seen some of those bunkers idle.

Q. You certainly can recollect. There are only three of them there. They are marked by distinct and peculiar marks. Which was it that you saw idle?

A. I seen the Howard Street and the Mission Street bunkers idle.

Q. For how long a period? Do you remember what day you saw the Howard Street bunker idle?

A. I don't remember the day. I did not take any particular notice. I did not consider it was any of my business. I did not pay any particular attention when I saw the bunker idle, that is, the wharf.

Q. How long did they remain idle?

A. They may have remained idle a day at a time, or two days at a time.

Q. You cannot swear to that?

A. I cannot swear to that, but I seen the wharves idle.

Q. Do you know whether that was in the shifting from one vessel to another or not?

(Testimony of Henry Nelson.)

A. I should naturally think it would not take a day or two to shift a vessel. I did not inquire into that.

Q. You do not know whether that was the cause of the idleness at that time? A. No, sir.

Q. You say you have been carrying coal cargoes into this port. What is the custom of this port with regard to the discharge of vessels which have arrived one after another and is to be docked at a certain dock?

Mr. HUTTON.—I object to that because it assumes a custom. Further, it is not in issue in this case, and is immaterial, and it is not shown that the witness knows.

The COURT.—I will hear the answer.

Mr. HUTTON.—I will take an exception.

A. What is the question?

Mr. DENMAN.—Q. Suppose a vessel arrives January the first, and another January 2d, and another January 3d. They are assigned to a certain dock, or a certain series of docks, three docks, say, and all the docks are occupied when they are assigned at that time. Gradually the docks become free. In what order are the vessels sent to the dock —of those three vessels that I have mentioned?

A. There are lots of causes that govern—

Q. I am eliminating that. I am presuming just that situation of vessels arriving January 1st, January 2d and January 3d. We will assume they are all sailing vessels, and have coal, and been assigned to a certain dock. What is the order in which, un-

(Testimony of Henry Nelson.)

der the custom of this port, those vessels will be docked?

A. It is according to how the charter-party reads.

Q. We will presume there are three different charter-parties, and that they all differ. What is the custom of the port with regard to the assignment of those docks to the different vessels as they come in?

Mr. HUTTON.—The same objection, that it assumes there is a custom; that it is not shown the witness is familiar with it if there is one, and further, it is immaterial and an attempt to set aside the express provision of the charter party by an alleged custom.

The COURT.—Answer the question, if you can.

Mr. HUTTON.—I will take an exception.

A. It is all according to how the charter-party reads.

Mr. DENMAN.—Q. You said that before. I am presuming there is no charter-party.

The COURT.—The witness' testimony is there is no uniform charter-party. That is what it amounts to. If each case depends on the particular charter that the ship has there is no custom that governs every charter or all charters.

Mr. DENMAN.—There may be a custom—

The COURT.—If what he says is true there is no custom; at least he does not know of any.

Mr. DENMAN.—Suppose there is no provision in the charter-party for the docking at all, and those three vessels come in. In what order would they be docked?

(Testimony of Henry Nelson.)

Mr. HUTTON.—I object to the question as immaterial. There is a charter-party here and an express stipulation in the charter-party as to how this vessel is to be unloaded; therefore the question is immaterial.

The COURT.—Let the question be answered, if the witness can answer it.

Mr. HUTTON.—I will take an exception.

A. What was the question?

Mr. DENMAN.—Q. Suppose each one of these charter-parties reads "to be discharged as customary." Suppose each one of those three charter-parties contain that provision, and the vessels arrive January the 1st, January 2d, and January 3d. What is the order in which they would be docked?

Mr. HUTTON.—Objected to as calling for the witness' construction of certain language which has a well defined meaning.

The COURT.—If he knows he can say so. If he does not know he will say so.

Mr. HUTTON.—Then the construction of the words "to be discharged as customary" that has been given by the courts of that language is, that it relates solely to the mode of taking the coal from the ship, and not the time of discharge, and consequently, the answer is immaterial.

The COURT.—(Addressing the witness.) Can you answer the question?

A. If the charter-party reads that the vessel shall have so many lay days to discharge, then she is supposed to be discharged in that length of time, and

(Testimony of Henry Nelson.)

it is up to the charterer to get the berth to discharge the vessel in that time or else pay demurrage. That is the way I always understood the charter-party, and that is the way I always construed the charter-party. If the charter-party reads "as customary discharge," that is the mode of discharging whether she is going to be discharged at the bunkers or at open wharves, or by buckets, or by steam or hand, or in lighters or barges.

Mr. DENMAN.—Q. Is that all you can say about it?

A. That is all I can say. That is the way I always understood a charter-party. In my charter-party it specifies that the vessel shall be discharged so many tons of coal per day. After that the vessel goes on demurrage.

Q. I am not talking about the relationship of the charter-party with the consignee or the charterers with the owners of the vessel. What I am trying to find out is what is the custom of the docks in this city. Who controls the use of the docks other than the private docks of the Western Fuel Company and others.

A. The Western Fuel Company controls some, and the Pacific Coast Company controls some.

Q. Who controls the others?

A. There is a concern at Vallejo Street wharf.

Q. Has the State any docks?

A. The State owns all the docks.

Q. Who under the State has charge of assigning to the docks?

(Testimony of Henry Nelson.)

Mr. HUTTON.—Objected to as matter that relates entirely to the rules of the Harbor Commissioners, and that is the best evidence.

The COURT.—I sustain the objection. You had better get some witness that can prove what the custom of the port was. This witness does not know anything about it.

Mr. DENMAN.—Very well; that is satisfactory.

Q. That is all you have to say about the condition of those docks that you saw idle on one or two occasions? A. That is all.

Mr. HUTTON.—I will now ask you, Mr. Denman, for a letter addressed to myself by J. J. Moore & Co., dated on or about the 1st of February, 1908.

Mr. DENMAN.—There it is (handing).

Mr. HUTTON.—And one dated February 8th.

Mr. HUTTON.—I offer in evidence a letter addressed by myself to J. J. Moore & Co., dated February 1st, 1908, and ask to have it marked Libellant's Exhibit "D."

(The letter is marked Libellant's Exhibit "D.")

I also offer in evidence a letter from J. J. Moore & Co., in reply thereto dated February 3d, 1908, and ask to have it marked Libellant's Exhibit "E."

(The letter is marked Libellant's Exhibit "E.")

I now offer in evidence as Libellant's Exhibit "F," a letter dated February 8th, 1908, from myself to J. J. Moore & Co., referring to this same matter.

(The letter is marked Libellant's Exhibit "F.")

I also offer the reply thereto from J. J. Moore & Co. dated February 10th, 1908.

(Testimony of Henry Nelson.)

(The letter is marked Libellant's Exhibit "G.")

If your Honor please, that is as far as I am able to proceed this morning. I had a subpoena issued for the Chief Wharfinger of the State Board of Harbor Commissioners, and the Marshal advises me he is not in town. I do not need him at this time, but I will in rebuttal. I also wish to clear upon the matter about the lay days by putting in testimony.

The COURT.—Can you proceed, Mr. Denman?

Mr. DENMAN.—Yes.

[Testimony of J. J. Moore, for the Defendant.]

J. J. MOORE, called for the defendant, sworn.

Mr. DENMAN.—Q. Do you remember, Mr. Moore, the circumstances of the arrival of the ship "Columbia" in this port in January of this year?

A. I remember the ship getting in and Captain Nelson coming to see me a few days afterwards; probably two days afterwards.

Q. Did you have any conversation with him?

A. Yes, sir.

Q. Concerning that vessel? A. Yes, sir.

Q. What was the nature of that conversation?

A. I told him that the cargo of coal was sold to the Western Fuel Company, and the ship would dock at their bunkers.

Q. Did you have any conversation as to the condition of those bunkers?

A. That they were crowded, and the vessel would probably be delayed three or four weeks before she could be docked.

(Testimony of J. J. Moore.)

Q. Where did that conversation occur?

A. In my office.

Q. And did you receive subsequently this letter that has been introduced in evidence here regarding the notice?

A. I do not remember that. It did not come to my hands. I presume it must have.

Q. What was the condition of the waterfront at that time with regard to the docking of coal-carrying vessels?

A. The coal bunkers were all about three to four or five weeks behind time.

Q. What do you mean by "three to four or five weeks behind time"?

A. I mean there were so many ships in the harbor dischargeable that they would be three or four weeks on demurrage—most of them—all of them.

Q. Is there any custom of this port with regard to the discharge of vessels arriving in San Francisco for docking here?

A. All ships are docked in their turn.

Q. What does that mean?

A. It means as a ship arrives she is put down in the books, and the next one is put down, and they are docked accordingly.

Q. How long have you been engaged in the coal business in San Francisco?

A. Twenty-five years.

Q. Have you been familiar with the custom of discharging this cargo in this port during that time?

A. Very.

(Testimony of J. J. Moore.)

Q. How long has that been the custom?

A. All the time I have been in business.

Q. Do you ship to other ports of the world?

A. We ship goods to other ports.

Q. You receive cargoes from other ports?

A. Yes, sir.

Q. Is that a universal custom of harbors, that vessels shall be docked in their turn where the harbor facilities are crowded?

A. It is. In some ports steamers take precedence over sailing vessels.

Q. What is the custom of this port in that regard?

A. I could not tell you. I presume it is that they take their turn.

Q. Have you kept the account of rainy days during the period in question, or was that done by some one in your office?

A. By some one in my office.

Q. Were you ever down to the dock yourself?

A. No, sir, not for a long time.

Cross-examination.

Mr. HUTTON.—Q. All you know about the bunkers being crowded is what some one has told you?

A. Yes, sir, I was told. I knew we had several vessels in our office that were *that were* all behind.

Q. Is it not a fact that the information that you got was that the bunkers were full, and consequently they could not put any more coal in them?

(Testimony of J. J. Moore.)

A. Oh, no, they were entering the bunkers all the time from day to day, as quick as they could.

Q. Is it not a fact on account of the vast amount of coal that your concern brought into town that they were forced to hire a number of other bunkers to store coal in and it was a crowding of bunkers, and not an overplus of other ships?

A. We did not import one-quarter of the coal that came into the harbor.

Q. Did you not import about that time over 40,000 tons of coal that arrived between October 6th, 1907, and January 1st, 1908?

A. I could not answer that question.

Q. I will ask you this: Did not the British ship "Strathmarin" come here chartered to you?

A. I think so.

Q. She brought 6,007 tons in on October 6th, 1907?

A. We have always ships or steamers coming in with coal all the time. We are very seldom without ships coming in with coal.

Q. I will ask you if the British ship "Borderer" did not arrive here on October 19th, 1907, with 5,893 tons of coal, consigned to you?

Mr. DENMAN.—What date do you claim that vessel was discharged?

Mr. HUTTON.—I will prove that afterwards.

A. The steamer arrived to us. I could not give you the dates. There is a young man who knows and can tell you. He has got it on his book.

(Testimony of J. J. Moore.)

Q. I prefer to ask you. With respect to the British steamer "Valdivia," state whether or not you know she arrived in this port with 5,938 tons of coal on October 29th, 1907?

A. I know she arrived. I could not give you the date.

Q. State whether or not the British steamer "Creaighall" with 5,630 tons arrived consigned to your firm about November 9th, 1907?

A. The "Craigall"?

Q. Yes.

A. I cannot give you the dates. She did arrive to us.

Q. She came consigned to you?

A. Yes, sir.

Mr. DENMAN.—I can give you the dates of that.

Mr. HUTTON.—Q. State whether or not the Norwegian steamer "Jethou" with 5,830 tons of coal did not arrive here on November 15th, 1907?

A. What is the name of that steamer?

Q. The "Jethou"? A. Yes, sir.

Q. She came consigned to you?

A. Yes, sir.

Q. State whether or not the British steamer "Riverdale" arrived here on December 20th, 1907, with 5,898 tons of coal.

A. She came consigned to us.

Q. Have you any information as to when she discharged?

Mr. DENMAN.—The "Riverdale"?

Mr. HUTTON.—Yes.

(Testimony of J. J. Moore.)

A. No, sir, I could not tell you. I can get it.

Q. The British steamer "Camphill"?

A. She came to us.

Q. With 5,500 tons of coal. Do you know whether that is correct or not?

A. She came to us. I could not tell you about the figure.

Q. State whether or not she did not arrive on January 10th, 1908?

A. I could not tell you that.

Q. The British bark "Battle Abbey"?

A. She came to us.

Q. She came consigned to you?

A. Yes, sir.

Mr. DENMAN.—What date is that?

Mr. HUTTON.—January 14th, 1908.

A. I cannot give you the date.

Q. The American schooner "J. H. Lunsmann"?

A. She came consigned to us.

Q. You know that the "J. H. Lunsmann" arrived after the "Columbia" and discharged about a month before her?

A. I could not tell you that.

Q. Did I understand you to say that you told Captain Nelson that he would be docked on the following Monday?

A. On the following Monday?

Q. What did you say? I did not catch your answer?

A. I told him he would probably have to wait three or four weeks before he was docked.

(Testimony of J. J. Moore.)

Q. Is it not a fact that some of this coal that came in the steamers I have mentioned is now stored in San Francisco in store-ships; has been taken out of the vessels and put in ships and kept there on account of the consumption not being up to the amount of coal brought into the port during that time?

A. I cannot answer that.

Q. You have no information at all about it?

A. Not any.

Q. Have you any information that there is at this time about 100,000 tons of coal on storage in ships in San Francisco that was brought in between those months?

A. I know there is a good deal of coal, but the amount I could not state.

Q. That is between the months of the arrival of these steamers?

A. I could not answer that question. After we sell the coal we lose all track of it. It is not ours. We have no coal. After we sell the coal we have no track of it. I could not answer what time it came in. I know it is there.

Redirect Examination.

Mr. DENMAN.—Q. The various coal cargoes referred to here as having come in prior to the arrival of this vessel, do you know whether or not any of those vessels were discharging at the time that this vessel was waiting for discharge in the port?

A. If the coal was sold to the Western Fuel Company they would not be discharged while that ship

(Testimony of J. J. Moore.)

was here. If it was sold to some one else who could take in the ships it possibly may be discharged.

Q. All that can be obtained from your office data?

A. Yes, sir.

Q. You have been engaged in the coal business, you say, for 25 years? A. Yes, sir.

Q. Was the amount of coal that you ordered and came in on those vessels at that time an unusual or extraordinary amount for you in your business to import?

A. Of late years, yes. Since the discovery of oil, the importation of coal has not been so heavy until two years ago?

Q. Then there was an increase in the quantity of coal?

A. A large increase in the importation of coal.

Q. What was the reason for that?

A. Principally because they could not get cars to bring coal from the East. We were shipping coal into Nevada and other places where we never shipped before. Oakland, San Francisco and other places that did get coal *from from* Wyoming did not get any coal during the shortage of cars.

Q. That shortage existed subsequent and prior to the great earthquake here? A. Yes, sir.

Q. The shortage had begun to exist prior to the fire? A. I think it had.

Q. The fire conditions, coupled with crop conditions East, increased the shortage of coal?

A. Yes, sir.

(Testimony of J. J. Moore.)

Q. That condition had existed you say for about two years back? A. Two or three years.

Q. This importation was not extraordinary in amount for the importation covering that period of two or three years?

A. No, sir. The winter before last coal was almost impossible to get, but when the depression came about a year or fourteen months ago the consumption of coal dropped off probably 200 per cent.

Recross-examination.

Mr. HUTTON.—Q. Is it not a fact, Mr. Moore that the shortage of coal during the winter of 1906 lasted about a month or a month and a half?

A. 1906?

Q. Yes. A. It lasted all the winter.

Q. That led a great many people to install oil-burning apparatus?

A. I think not oil. A good many people for house purposes installed gas. I think the oil burning did not change very much. Nearly all the oil burners were already installed.

Q. There was a large increase in the consumption of oil in San Francisco and the Pacific Coast, in the last two or three years.

A. That is because they are spreading out. They are sending oil to Portland, and Alaska, and various other places.

Q. In local consumption there has been a large increase.

A. I should not have thought so.

(Testimony of J. J. Moore.)

Q. Don't you know during the winter of 1906 on account of the scarcity of coal that made the Gas Company to install a very large number of gas burners, and the people to get gas stoves in their house?

A. I have heard so.

Q. That led to a decrease in the consumption of coal.

A. That would be a very small amount in comparison with what we lost through the fact of the let up in the shortage of cars. That was the principal factor in the loss in the consumption of coal.

Q. That led to this extraordinary increase in the importation at that time? A. Yes, sir.

Further Redirect Examination.

Mr. DENMAN.—Q. I do not think you understood that, Mr. Moore. As I understand, the shortage of cars led to the increased importation. Then the depression came and you had an excess car supply, and that caused the congestion of coal in San Francisco. A. That was my answer.

[Testimony of William Mainland, for the Defendant.]

WILLIAM MAINLAND, called for the defendant, sworn.

Mr. DENMAN.—Q. What is your business, Mr. Mainland?

A. Clerk and Secretary to J. J. Moore & Co.

Q. How long have you been there?

A. A little over ten years.

Q. What position do you hold there? What is your function there?

(Testimony of William Mainland.)

A. Cashier, and I attend to the coal vessels.

Q. Have you a record of vessels arriving consigned to J. J. Moore & Co. from, say, a period of two months prior to the 15th of January, 1908?

A. Yes, sir.

Q. On the 15th of January, was there any vessel which had arrived prior to that time discharging at any dock in the port of San Francisco?

A. Repeat that question?

Q. Was there any vessel discharging on the *5th* of January that had arrived in San Francisco, prior to that time?

A. No, sir; there was no ship consigned to J. J. Moore & Co. discharging then.

Q. No matter consigned to J. J. Moore & Co.—

A. Not discharging coal.

Q. Not discharging coal at that time?

A. No, sir.

Q. Does your record show when the "Strathnarin" was discharged?

A. The "Strathnarin" was discharged on the 17th of October.

Q. When was the "Borderer" discharged?

A. The "Borderer" was discharged on the 4th of November.

Q. And the "Valdivia"?

A. On the 13th of November.

Q. And the "Craighall"?

A. On the 23d of November.

Q. And the "Jethou"?

A. Midnight of the 30th of November.

(Testimony of William Mainland.)

Q. And the "Riverdale"?

A. On the 3d of January.

Q. And the "Camphill"?

A. On the 13th of February.

Q. And the "Battle Abbey." When was she discharged?

A. She has got some of her cargo in her yet. She had coke and coal. Most of the coal is in her yet.

Q. Do you know when she was discharged?

A. She finished her coke on the 6th of February.

Q. Whereabouts?

A. At the Selby Smelting Works, Vallejo Junction.

Q. Did she discharge in the port of San Francisco at all?

A. She discharged 60 tons into a barge.

Q. Into a barge? A. Into a lighter.

Q. She did not fill the docks at *any during* this period? A. No, sir.

Q. When was the "Lunsmann" discharged?

A. The "J. H. Lunsmann" finished discharging on March the 4th.

Q. Where was the "Lunsmann" discharged?

A. She discharged on Washington's Birthday 324 tons at Folsom Street wharf to lighten her up so that she could proceed up Oakland creek to discharge at the Howard bunkers in Oakland.

Q. She was not discharged in San Francisco except for that lightening? A. That is all.

(Testimony of William Mainland.)

Q. What is the custom of the port in regard to the method of discharging vessels where several vessels arrived, and are to be discharged at a certain dock?

A. They take their turn as far as I have observed.

Q. How long have you been in the business?

A. A little over ten years.

Q. In what branch of the shipping business?

A. The coal department mostly. Most of my duties have been in connection with coal vessels.

Q. You are familiar with the method of discharging coal vessels? A. Yes, sir.

Q. What is that method with regard to the succession in which vessels are discharged where several are waiting discharge at a certain dock or bunker?

A. Sailing vessels generally take their turn. Steamers are given preference over sailing vessels.

Q. Steamers are given preference over sailing vessels? A. Yes, sir.

Q. Is that the custom of this port?

A. As far as I have observed, that is the custom.

Q. That has been so over this period of years that you have described?

A. Yes, sir, I think so.

Cross-examination.

Mr. HUTTON.—Q. Now, Mr. Mainland, I think your name is, the "J. H. Lunsmann" arrived here on January 21st, 1908, did she not?

A. Yes, sir, she did.

(Testimony of William Mainland.)

Q. She arrived after the "Columbia," and discharged before?

A. Yes, sir, she arrived after.

Q. With respect to the "Battle Abbey": She discharged some coal on a lighter, and then she discharged coke, and don't you know that after she discharged coke they put some of her coal back into her again, and she has now it aboard of her as a store ship?

A. No, sir, they did not put it back. It was left in her. It was not discharged.

Q. You know that the great trouble at that time was that the bunkers were crowded. They could not get the coal away from the bunkers, so that the ships could not get alongside to put it in.

A. In regard to the "Battle Abbey"?

Q. That was the condition that prevailed. They had to provide store ships to get the coal out of the bunkers? A. So I understand.

Q. There is a great deal of that coal in port now that came about that time?

A. I think there is.

Q. So the real difficulty was not the fact of an excessive quantity of ships but the difficulty in getting rid of the coal. That is the way you understand it?

A. That is what I think was the trouble.

Q. What information have you, Mr. Mainland, about custom. You never heard any one tell you that was the custom, did you?

(Testimony of William Mainland.)

A. We have had a good many vessels in. I observed the way they generally dock them. They take the first vessel in.

Q. That is the way your firm has been in the habit of doing? A. Yes, sir.

Q. You always, as a rule, unload them within the lay days specified in the charter-party, do you not; that is up to the time of this overcrowding or overplus of coal here. You always manage to unload them in the lay days?

A. We generally did.

Q. Is it not a fact that the "Camphill" went alongside of the dock on February 6th, and finished discharging on February 14th?

A. She finished on the 13th.

Q. Your firm brought in between October 6th and January 21st about 45,000 tons of coal into this port, did it not?

A. I have not the figures handy here.

Q. Mr. Moore was unable to give them. He said you had them. Probably if I read this off you will be able to remember? A. Yes, sir.

Q. The "Strathnarin," 6,007 tons; is that approximately correct? A. That is correct.

Q. The "Borderer," 5,893 tons, arriving October 19th, 1907. Is that approximately correct?

A. 5,893 tons, that is correct.

Q. The "Valdivia," 5,938 tons, arriving October 29th, 1907. Is that approximately correct?

A. Arriving October 29th.

(Testimony of William Mainland.)

Q. The "Craighall," 5,630 tons, arriving November 9th, 1907. Is that approximately correct?

A. That is correct.

Q. The "Jethou," 5,830 tons, arriving November 15th, 1907. Is that approximately correct?

A. That is approximately correct.

Q. The "Riverdale," 5,898 tons, arriving December 20th, 1907. Is that approximately correct?

A. That is correct.

Q. The "Camphill," 5,500 tons, arriving January 10th, 1908. Is that approximately correct?

A. That is correct.

Q. The ship "Columbia" with 2,220 tons, arriving January 14th, 1908. Is that approximately correct too? A. Yes, sir.

Q. And the "J. H. Lunsmann" with 1760 tons. arriving January 21st, 1908. That is approximately correct, is it not?

A. That is approximately correct.

Redirect Examination.

Mr. DENMAN.—Q. All that coal was sold prior to arrival?

A. All that coal was sold prior to arrival.

Mr. DENMAN.—When Mr. Hutton brings his further evidence I will have to meet that, if your Honor please, and bring some evidence to rebut the testimony of the captain as to the condition of the bunkers. On those days in which he suggested there had been a vacancy at the docks, we will show that the docks were continuously occupied by vessels prior to the arrival of the vessel.

(Testimony of William Mainland.)

Mr. HUTTON.—The only thing I want to put in is the rainy days. I have that in my office.

Mr. DENMAN.—Q. Mr. Mainland, is a part of your duties to keep account of the weather to determine whether or not vessels can be discharged on various days, and to compute lay days?

A. It is.

Q. Can you give the condition of the weather in the days succeeding the 15th of January, 1908.

A. Yes, sir, I can.

Q. What was the condition of the weather on the 18th day of January? A. It was rainy.

Q. What does that mean?

A. It means that rain fell during the day. It is customary when it is raining not to count it as a lay day.

Q. That is rain sufficient to interfere with the unloading of the ship? A. Yes, sir.

Q. How about the 20th?

A. It was raining on the 20th.

Q. And in the same quantity? A. No, sir.

Q. I mean in sufficient quantity to interfere on those days?

A. In a sufficient quantity to prevent it being called a lay day as a customary way of figuring it.

Q. What quantity is that?

A. We generally figure if it is raining at all it is not counted as a lay day.

Q. How about the 23d day of January?

A. It was raining on the 23d.

Q. On the 24th day of January?

(Testimony of William Mainland.)

A. Also raining.

Q. How about the 29th day of January?

A. It was raining on the 29th.

Q. The first day of February?

A. It was raining on the first day of February.

Q. And the 4th of February?

A. Also raining.

Q. Have you any further account of the weather after the 4th of February?

Mr. HUTTON.—That does not cut any figure.

A. I took a memorandum off of my calendar that I put the rainy days on after that; the 18th, 20th, 23d, 24th, Feb. 1st, 4th, 28th, 29th, March 2d, 4th, and 5th, were rainy days.

Recross-examination.

Mr. HUTTON.—Q. Where did you get that information from? A. The rainy days?

Q. Yes. A. I took it off my calendar.

Q. You took the information in your office?

A. In my office, yes.

Q. Did you ever at any time during those days go down and see whether they were working coal or not? A. I did not.

Q. You never did? A. No, sir.

Q. Sometime they worked coal down there when you would not care about working as a clerk or Secretary? Is that not so?

A. I am sure I don't know.

Q. You do not know as a matter of fact whether they worked coal on those days or not, because you did not go down to see? A. I did not.

(Testimony of William Mainland.)

Q. You did not at any time go down and see during this period whether any of these docks were full, or whether they were empty?

A. No, sir, I did not.

Further Redirect Examination.

Mr. DENMAN.—Q. Your testimony is simply that those were rainy days, and rainy days sufficient to interfere with the unloading of coal, as you understand it, in the practice of unloading coal here in San Francisco? That is correct is it?

A. That is correct.

(An adjournment is here taken until Monday, November 9th, 1908, at 10 o'clock A. M.)

[Testimony of William Nelson for the Libelant (Recalled).]

Monday, November 9th, 1908.

WILLIAM NELSON, recalled.

Mr. HUTTON.—Q. From the 15th of January up to and including the 14th day of February in this present year, did you keep any memorandum of the working days on the wharves of San Francisco?

A. Yes, sir.

Q. Did you keep it in writing?

A. Yes, sir.

Q. In your own handwriting?

A. Yes, sir.

Q. Have you got it with you?

A. Yes, sir.

Q. Can you, without consulting that, testify now what were working days, and what were not?

(Testimony of William Nelson.)

A. I could not.

Q. You need that for the purpose of refreshing your memory?

A. Yes, sir, I could not carry that in my head.

Q. Take the paper, and I will give you the days, and will ask *you tell* us the character of weather on each day. On the 15th of January, 1908—these will all be 1908—was that a fine day, or a rainy day?

A. A fine day.

Q. On the 16th of January, what character of day was that?

A. We worked on the bunkers that day.

Q. Weather fine? A. Yes, sir.

Q. The 17th day of January.

A. Worked on the bunkers all day.

Q. The 18th day of January.

A. Rained all day. No work on bunkers.

Q. The 19th day of January, I think was Sunday.

A. The 19th day of January was Sunday.

Q. The 20th.

A. It was fine weather until 2 P. M. and rained after 2 P. M.

Q. Did they work in the forenoon or not?

A. Yes, sir, up to 2 P. M.

Q. I will interrupt you just for a moment. What are the working hours per day on the wharves in San Francisco?

A. From 7 to 5, or from 8 to 5. I would not be sure of that. I would not be sure if it was from 7 to 5, or from 8 to 5.

Q. Any break for dinner?

(Testimony of William Nelson.)

A. Yes, sir, they have one hour for dinner.

Q. What hour, 12 to 1?

A. 12 to 1. Yes.

Q. Now, the 21st. What character of day was that?

A. Worked on the bunkers all day.

Q. The 22d.

A. Worked on the bunkers all day.

Q. The 23d.

A. Rained half a day until 12 noon.

Q. How about the afternoon?

A. Worked in the afternoon.

Q. The 24th.

A. Worked all day on the bunkers.

Q. The 25th.

A. Rained in the forenoon. Worked in the afternoon on the bunkers.

Q. The 26th, I think was Sunday.

A. The 26th was Sunday.

Q. The 27th.

A. Worked all day on the bunkers.

Q. The 28th.

A. Bunkers worked all day.

Q. The 29th.

A. Worked until noon. Rained in the afternoon.

Q. No work in the afternoon?

A. No work in the afternoon.

Q. The 30th.

A. Worked all day on the bunkers.

Q. The 31st.

A. Worked all day on the bunkers.

(Testimony of William Nelson.)

Q. February 1st.

A. Rained all day. No work on the bunkers.

Q. The 2d was Sunday.

A. The 2d was Sunday.

Q. The 3d. A. Worked all day.

Q. The 4th.

A. Worked half a day—in the afternoon. No work in the forenoon.

Q. Was that half a day, or a quarter of day?

A. Half a day.

Q. The 5th. A. Worked all day.

Q. The 6th.

A. Worked all day on the bunkers.

Q. The 7th. A. Worked all day.

Q. On the 8th.

A. On the 7th, the lay days expired.

Q. I do not care about that. On the 8th.

A. Worked all day.

Q. The 9th was Sunday.

A. The 9th was Sunday.

Q. The 10th. A. Worked all day.

Q. The 11th. A. Worked all day.

A. The 12th. A. Worked all day.

Q. The 13th.

Mr. DENMAN.—We admit it was clear weather up to the 23d.

Mr. HUTTON.—Q. You know the schooner "J. H. Lunsmann"? A. Yes, sir.

Q. A sailing vessel? A. Yes, sir.

Q. Prior to the discharge of this cargo, at the time rather that the "Columbia" went alongside of

(Testimony of William Nelson.)

the dock, did you ever receive any bill of lading from anyone? A. No, sir.

Q. How long did it take to discharge *to discharge* the coal upon this occasion?

A. About two days and a half, I think. I would not be sure of the exact time; something like that; about two days and a half.

Q. You think she was discharged inside of three days from the commencement.

A. I think so.

Q. With respect to the two corporations mentioned in the libel here, A. Anderson & Co. and Boole & Co., you have done business with them?

A. Yes, sir.

Q. They are both corporations?

A. Both corporations.

Cross-examination.

Mr. DENMAN.—Q. You say that there was work done on the bunkers; how do you know that?

A. Because I went down and looked.

Q. Did you go down to the Western Fuel bunkers?

A. Where I can see them, yes.

Q. On each one of these days?

A. Yes, sir, I went down every day.

Q. You wanted to keep track of the weather?

A. To keep track of my lay days.

Q. You are sure they were working on those bunkers during those days?

A. I am sure they were working on those bunkers during those days. If it was raining, they were

(Testimony of H. Larsen.)

working on some other vessels. If the bunkers were not working, they were working on other vessels.

Q. You are satisfied that during these days, from January 15th on until the end there, that they were working either on those bunkers, or you went near enough to see that the weather condition was such that they could work there?

A. If the bunkers could not work, there were other vessels working around the wharves discharging coke or other cargoes.

Q. You satisfied yourself as to the bunkers, and then, if there was not anybody working there, you looked at the other vessels.

A. I looked at the other vessels.

Q. You mean the Western Fuel bunkers?

A. Yes, sir, the Western Fuel bunkers.

[Testimony of H. Larsen, for the Libelant (Recalled).]

H. LARSEN, recalled.

Mr. HUTTON.—Q. How many days did it take to discharge the coal when they commenced working on her?

A. About two and a half days.

Q. Prior to the time that she was discharged, or at any time after your arrival to San Francisco, on the ship in question, were you ever presented with any bill of lading by anyone? A. No, sir.

Q. You went according to the instruction, put the vessel alongside the dock, and the coal was taken out of her? A. Yes, sir.

Q. You got no bill of lading at all?

(Testimony of Thomas A. Hender.)

A. No, sir.

Mr. DENMAN.—That is all.

[Testimony of Thomas A. Hender, for the Libelant.]

THOMAS A. HENDER, called for the libelant, sworn.

Mr. HUTTON.—Q. You are the Chief Wharfinger in San Francisco, are you not?

A. Yes, sir.

Q. Have you got with you a list of the vessels that were discharging coal, *and* Howard and Folsom and Mission wharves between January 15th, 1908, and March, 1908? A. Yes, sir.

Q. Please turn to Howard No. 2. That is a coal wharf, is it not, where they discharge coal?

A. Yes, sir.

Q. Howard No. 2? A. Howard No. 2.

Q. I will just ask you what vessels were there, that is, in January. I do this so that I will not break into your list there.

A. My wharfinger did not segregate the dates at that particular wharf.

Q. I should like to segregate the dates.

A. I have the list of the vessels, but not the particular dates on which they were there.

Q. Your subpoena required you to give the dates?

A. No, sir, it said from January 16th to March 16th, in my subpoena.

Mr. DENMAN.—You can take whatever time the Court will allow to get the exact dates.

Mr. HUTTON.—I have an exact list from the harbor *commissioners given* the dates.

(Testimony of Thomas A. Hender.)

The WITNESS.—On the other two wharves I have the respective dates. On this one it is an oversight.

Mr. HUTTON.—Q. Then we will take Mission No. 2. A. Yes, sir.

Q. From the 19th to the 20th of January, what vessels were there, that is at Mission No. 2?

A. Nothing between those dates. The first date I have is January 23d, the "Cecil."

Q. Was there any vessel there between the 20th and the 23d? A. No, sir.

Q. None?

A. Not from the report of my wharfinger.

Q. Between the 9th and 20th, the "Bankfield" was there, was she not? A. Not on my list.

Q. From the 20th to the 23d, there was no vessel there? A. No, sir.

Q. From the 23d to the 31st, the "Cecil" was there, was she not? A. Yes, sir.

Q. From the 1st of February to the 5th, what vessel was there?

A. I have not any on my list.

Q. Not any?

A. Commencing on the 6th, is the "Camphill."

Q. Until the 13th. Is that right?

A. I have February 6th. I was not under the impression that you wanted these particular dates from the time they arrived until they departed. I will have to get that.

Q. If you have not the information, I cannot use you. I am very sorry. I wanted those particular

(Testimony of Thomas A. Hender.)

dates. I have a list of them from the Harbor Commissioner.

The COURT.—Are you through with the witness?

Mr. HUTTON.—Yes. Mr. Denman and myself will go over this list, and probably agree on it later, so as to save any further trouble.

Mr. DENMAN.—That is all.

Mr. HUTTON.—I will call on you for that bill of lading, Mr. Denman.

Mr. DENMAN.—I have not the bill of lading, but I agree it is in the form that is pleaded.

Mr. HUTTON.—In whose possession is it?

Mr. DENMAN.—I cannot tell you.

Mr. HUTTON.—Have you got the contract?

Mr. DENMAN.—Yes. There it is. (Handing it.)

[Testimony of William Mainland, for the Libelant (Recalled).]

WILLIAM MAINLAND, recalled.

Mr. HUTTON.—Q. You testified, did you not, at the last hearing, that this coal on the "Columbia" was sold prior to arrival?

A. Yes, sir.

Q. Sold under a written contract?

A. Yes, sir.

Q. Is that the contract? (Handing.)

A. That is the contract.

Mr. HUTTON.—I desire to offer that in evidence, if your Honor please, as Libelant's Exhibit "H."

(The paper is marked Libelant's Exhibit "H.")

(Testimony of William Mainland.)

Cross-examination.

Mr. DENMAN.—Q. This contract is dated November 24, 1906, and it *is calls* on its face for 30,000 or 40,000 tons to be delivered in 1906 and 1907, that is to say, there would be fourteen months' time during which to deliver between 30,000 and 40,000 tons of coal to the Western Fuel Company?

A. Yes, sir.

Q. I desire to ask you, what vessels had delivered coal to the Western Fuel Company under this contract subsequent to November 24th, 1906? First, let me ask you what vessels did deliver coal to the Western Fuel Company after November 24th, 1906, whether under this contract or any other contract. Have you got it there?

Mr. HUTTON.—Under any other contract would be immaterial, if your Honor please.

Mr. DENMAN.—We are running it down, that is all.

A. I will have to look it up. I have not got it tabulated so that I can find it.

Q. Do you remember preparing that statement for me (handing)? A. Yes, sir.

Q. Is that a correct tabulation from your records? A. That is correct.

Q. Refresh your memory from that and tell me what vessels after November 24th—

The COURT.—Just introduce that in evidence. It covers the whole thing, does it not?

Mr. DENMAN.—Yes.

(Testimony of William Mainland.)

Mr. HUTTON.—I desire to object to anything that was not delivered under this particular contract as immaterial.

The COURT.—I will consider that later. It shortens his testimony.

(The paper is marked Defendant's Exhibit "1.")

Mr. DENMAN.—Q. Do you know whether the steamer "Camphill" was delivered under this contract, or some other contract?

A. The "Camphill" was discharged in February, between the 9th and 13th under a separate contract.

Q. Not under that contract?

A. Not under that contract.

Q. Were any vessels discharged at the Western Fuel docks in San Francisco other than showed by that statement that you gave to me, during those periods mentioned.

A. During those periods, no.

Redirect Examination.

Mr. HUTTON.—Q. You do not mean by that that there were no vessels at all discharged?

A. I mean for account of J. J. Moore & Co.

Q. I call your attention to this memorandum that you just handed to Mr. Denman: "S. S. 'Craighall.' Arrived November 9th, 1907. Commenced discharge at Oakland Long Wharf, November 12th, 1907." That is over the Bay of San Francisco. They discharge coal there also, don't they?

A. She discharged over there.

(Testimony of William Mainland.)

Q. The "Jethou," she was discharged at Beale Street, was she not? A. Yes, sir.

Q. That is not a Western Fuel dock?

A. No, sir.

Q. The "Riverdale" also discharged at Beale Street. That is not a Western Fuel dock?

A. No, sir.

Q. The "Camphill" was discharged at Mission Street? A. Yes, sir.

Mr. HUTTON.—I have no objection to that paper.

Recross-examination.

Mr. DENMAN.—Q. This "Craighall," November 9th, cargo sold to the Western Fuel Company, to whom was that delivered at Oakland Long Wharf?

A. To the bunkers of the Southern Pacific Company.

Q. And sold to the Southern Pacific Company ultimately? A. Yes, sir.

Q. Those are private bunkers, are they not?

A. The Southern Pacific Company's private bunkers.

Q. For consumption of the Southern Pacific in its transportation business?

A. Mostly used by the Southern Pacific Company.

Mr. HUTTON.—That is our case, if your Honor please.

[Testimony of F. C. Mills, for the Defendant.]

F. C. MILLS, called for the defendant, sworn.

Mr. DENMAN.—Q. What is your business?

A. Superintendent for the Western Fuel Company.

(Testimony of F. C. Mills.)

Q. What business is the Western Fuel Company engaged in?

A. In the coal business, and building material.

Q. How long have you been engaged in the coal business yourself?

A. In the neighborhood of twenty years.

Q. In the port of San Francisco?

A. Yes, sir.

Q. And how long have you been connected with the Western Fuel Company?

A. Ever since they started.

Q. How long is that?

A. Go on about five years. I would not be positive about that.

Q. Have you had business from time to time with J. J. Moore & Co. A. I have.

Q. Of what character?

A. Simply giving data from them in reference to their ships that we had taken coal from them.

Q. That is, from time to time, you bought cargoes of coal from them? A. Yes, sir.

Q. Do you recollect the conditions as to the coal trade in January, of this year?

A. What do you mean?

Q. You were in charge of the docks in January, of this year? A. Yes, sir.

Q. Do you recollect receiving a cargo of coal from J. J. Moore & Co. in the month of February, from the steamer "Camphill"?

A. I remember the steamer "Camphill," yes.

Q. Was she discharged about that time?

(Testimony of F. C. Mills.)

A. I should have to look up my records. I cannot call it to my mind.

Q. Have you got it there?

A. We had so many ships there that I cannot remember just the dates on them. About what time do you think it was?

Q. About February 7th or 8th.

A. The "Camphill" commenced on the 6th of February to discharge.

Q. What kind of coal did she have, do you know?

A. It was Australian coal.

Q. House or steam coal? A. Steam coal.

Q. Do you know when the "Columbia" was discharged? Look at your records about the 17th of March?

A. The "Columbia" commenced to discharge on March 18th and finished on the 20th.

Q. Captain, what is the custom of the port with regard to the discharge of colliers where they have arrived in too great a number to be discharged at once at the coal docks of the port.

Mr. HUTTON.—I object to that, if your Honor please, as entirely immaterial. You cannot vary a written contract by a custom.

The COURT.—Let the question be answered.

Mr. HUTTON.—I will take an exception.

A. Colliers always take preference over sail.

Mr. DENMAN.—Q. That is to say, steam vessels take preference over sail.

A. Steam vessels take preference over sail.

(Testimony of F. C. Mills.)

Q. What, with regard to the order in which each in its class is discharged?

A. They try to discharge them according to their arrival.

Q. Steam before sail, and each class in the order of its arrival? A. Yes, sir.

Q. That is the custom of the port?

A. That is the custom of the port, and on account of having to have the steam to take charge of other steamers going out.

Q. How long has that been the custom of the port?

A. I have done it ever since I have been in the business there.

Q. That is some twenty years in this port?

A. About twenty.

Q. Are you familiar with the custom in any other ports? A. No, sir, I am not.

Q. What was the reason for the delay in the discharge of the "Columbia"?

A. The delay was on account of the congested condition of our bunkers and storage places, and the numbers of steamers arriving in here one after the other.

Q. Then I am to understand that the vessel was delayed by steamers who had preference over her, or by the congested condition of the bunkers until the time that she was discharged? A. Both.

Q. What was the reason for the congested condition of your bunkers?

A. On account of no demand for the coal.

(Testimony of F. C. Mills.)

Q. Why was that?

A. The condition that occurred all over the country. In the first place, there were big shipments of coal coming out here from the western states which had not come out for two or three years. We had big orders previous to that from the country which all slumped off.

Q. Where does the bulk of this coal come from that you use in this port?

A. Australia and British Columbia.

Q. How long a time ahead do you have to make provision for the coal supply?

A. We have to figure a year ahead.

Q. The coal that you brought into San Francisco that congested this harbor in January and February and March of this year had been ordered somewhere a year prior to that time? A. Yes, sir.

Q. What can you say on the condition of the market at the time the coal was ordered as to justifying the amount of coal that you then ordered?

A. There was a big scarcity of coal here the previous year, and a big demand all through the country. Those demands were larger on account of no supplies coming from the western States.

Q. What was the effect of the depression of 1907 on the supply of coal coming from the Rocky Mountain States?

Q. There was no business on the railroads. They had plenty of cars to spare and brought coal in which they had not done previously.

(Testimony of F. C. Mills.)

Q. For two or three years, as I understand, they had not done that, and your coal trade had built up in the towns of Nevada, Arizona and middle California?

A. Yes, sir, there were big demands from all those points for coal from this point.

Q. This coal ordered for a year prior to January, 1907, was to meet the business that had grown up in those cities?

A. In those cities and along the coast.

Q. As I understand, the Australian coal could not compete with the Middle Western coal when they began to throw them in along the fall of 1907, and the early portion of 1908.

A. I did not understand your question there. The coal coming in from both points, there was a much larger supply of coal here than there was a demand.

Q. You have spoken of the rule of discharge at your bunkers, and the custom of the port. Had J. J. Moore & Co. any relationship with your company that could force you to change that rule on behalf of its particular vessels?

A. No, sir, not that I know of.

Q. There was no method by which they could have procured an earlier discharge from you for the "Columbia"? A. No, sir.

Q. That custom was the reason why you could not permit the "Columbia" to dock earlier than that date?

(Testimony of F. C. Mills.)

A. That and the congested condition we were in

Q. What is a weather working day in this port?

Mr. HUTTON.—I submit that that is a matter of law.

The COURT.—I will hear what he says about it.

A. From 8 to 5. In the last month, they have changed back to 7 to 5. It used to be some years ago 7 to 5. Just after the earthquake the Unions forced us to make it from 8 to 5.

Mr. DENMAN.—Q. What is the condition of the stevedoring business in this port. Is there a Union of Stevedores? A. Yes, sir.

Q. Can you get any stevedores outside of that?

A. You can get non-union men, yes, but you cannot do your work with them.

Q. Is it not practical to use them?

A. It is not practical to use them.

Q. What is the effect of rain on obtaining a supply of stevedores to discharge a vessel supposing the morning is rainy?

A. They simply will not go to work.

Q. Can you procure their return during the day?

A. That depends entirely; if the rain stops in a few hours, you can; otherwise they will drift away, and you cannot get them.

Q. You cannot collect them?

A. No, sir, they get around saloons, and drift off and go home.

Q. Have you a list there of the days on which it was possible to discharge in San Francisco between January 15th and March 17th?

(Testimony of F. C. Mills.)

A. I made up a list. I do not think I could get that from my book.

Q. You have not got that list?

A. No, sir, not of the rainy days altogether. I made up a list of the rainy days.

Q. Is that the list that you made up (handing)?

A. Yes, sir.

Q. Is that correct? A. That is correct.

Q. Could you discharge coal on any of those days marked "rainy days"?

A. You could, providing you could get the stevedores to work for you.

Q. Could you, under the condition under which the Unions were working? A. No, sir.

Q. That is from your record?

A. Yes, sir.

Mr. DENMAN.—We offer that in evidence.

(The paper is marked Defendant's Exhibit No. 2.)

Cross-examination.

Mr. HUTTON.—Q. From what did you make this up?

A. From the rainy days. The port rainy days I got from the Weather Bureau.

Q. That is, since the last week or two, you have gone to the Weather Bureau and got this data. Is that correct?

A. No, sir, I got that a long while ago.

Q. When did you get it?

A. I could not tell you just the date. It was a long while ago that I got it.

(Testimony of F. C. Mills.)

Q. You have not any original information or any memoranda made by yourself at that time, have you?

A. I have, partially, yes. I do not know I have got it in full.

Q. I will ask you about this paper. On January 17th, it says, "Raining." Would you say that it was raining all day or half a day, or what?

A. I would not say it was raining all day. That I could not remember.

Q. On January 20th, it says, "Raining." Would you say it was raining all day?

A. I could not say that.

Q. You would not say that with reference to any of these?

A. No, sir, I could not state the number of hours during that time that it was raining.

Mr. HUTTON.—I have no objection, if your Honor please, to this going in for what it is worth, but I *do think* it is worth very much.

Q. Have you a list of the vessels that discharged at Mission No. 2 during the month of January, 1908?

A. I think I can give it to you from my book. I have not the list made up. I have got them noted here. I have got them down. All that I put down as a rule in my book is, when a ship comes in to the dock, the date of arriving at the dock and discharge.

Q. To facilitate the matter, I will take Mission No. 2. The "Bankfield" was from the 9th to the 20th of January?

A. The "Bankfield" commenced on the 11th.

(Testimony of F. C. Mills.)

Q. She went to the dock on the 9th?

A. There might have been congested condition. I have got down the time it commenced working.

Q. The "Bankfield" went there, you were unable to take the coal on account of the bunkers being filled, and you did not work for a couple of days?

A. Possibly. She did not commence until the 11th. If she was there previous to that, waiting, I do not remember.

Q. She left on the 20th?

A. Yes, sir, we finished her on the 20th.

Q. The next vessel that arrived there was the "Cecil" on the 23d?

A. Yes, sir, the "Cecil" commenced on the 24th.

Q. She arrived at the dock on the 23d, and she stayed until February 5th, did she not?

A. January 5th she finished — February 5th, I meant to say.

Q. The "Camphill" commenced on the 6th stayed until the 13th, did she not?

A. She commenced on the 6th of February, and she finished on the 12th.

Q. And left on the 13th?

A. That I could not tell you.

Q. There was no other vessel arrived there discharging until the 17th, was there Mr. Mills?

A. The 17th?

Q. That was the "River Forth"?

A. The "River Forth."

Q. She stayed until the 28th?

A. The "River Forth" finished on the 27th.

(Testimony of F. C. Mills.)

Q. And left on the 28th? A. Possibly.

Q. The next vessel to arrive was the "Gymeric," or "Semeric" on the 4th of February.

A. The "Gymeric," the 4th of March.

Q. Kindly turn to Howard No. 2.

A. You will have to give me the name of the vessel.

Q. I will give you the name of the vessel, the "M. F. Plant" was there from the 9th to the 15th, was she not? A. Of what month?

Q. January.

A. Yes, sir, she was there on the 9th.

Q. She was there on the 15th also, was she not?

A. No, sir.

Q. The "M. F. Plant" takes about one day to discharge, or less?

A. She comes down with 2 or 300 tons.

Q. She comes from Coos Bay, and you discharge her in a day?

A. She was not there on the 5th.

Q. With respect to the "Hornelen."

A. What date was that?

Q. She arrived on the 19th of January.

A. The "Hornelen" docked on the 21st.

Q. There was nothing there between the 15th and 21st, was there?

A. Possibly not. Possibly the bunkers were full and congested, and we could not put anything there.

Q. You say she docked on the 21st. When did she leave?

A. She went in the stream on the 18th.

(Testimony of F. C. Mills.)

Q. There was nothing there at Howard No. 2 from the 18th until the 31st when the "Yeddo" arrived?

A. Yes, sir, the "Yeddo" was there on the 31st. On the 30th, in fact, she went in.

Q. I think she stayed until the 9th of February, did she not? A. Until the 7th.

Q. There was nothing there, was there, at that dock, from the 7th until the 14th, except the "M. F. Plant," which was there on one day, the 11th?

A. The 11th of February?

Q. Yes.

A. The "Plant" was not there then.

Q. When did the French bark "La Rochefacauld" arrive? She arrived on the 14th, did she not?

A. I have not got that down. She did not come to us. I have not got that.

Q. Do you know of any vessel that was at Howard No. 2 after the "Yeddo" left, Mr. Mills, that is during the month of February?

A. In the month of February?

Q. Yes.

A. I guess our bunkers were full at that time. I do not see anything there. There was nothing there.

Q. I will just go to Folsom No. 2; if you will kindly take the "S. S. Fordenskygold," a Norwegian steamer, I should judge. A. At what date?

Q. The 9th of January.

A. That is the "Turgenskygold."

(Testimony of F. C. Mills.)

Q. I guess that is the word. She went there on the 6th of January? A. Yes, sir.

Q. And she left on the 9th?

A. She left on the 10th to go to Oakland.

Q. The "Finn" was the next vessel that arrived on the 14th.

A. Arrived in port, do you mean?

Q. No, arrived alongside of the dock. I have reference to the dock when I speak about these vessels.

A. The 14th.

Q. She stayed until the 23d? A. The 22d.

Q. The "Indra" took her place on the 23d, did she not?

A. Yes, sir, the "Indra" went in on the 24th.

Q. And she stayed, did she not, until the 3d of February? A. On the 2d of February.

Q. The next vessel that took her place, that is, the one that succeeded her in discharging, was the "Salatio" on the 8th, was it not?

A. What ship was that?

Q. The "Salatio," a steamer.

A. We had that vessel.

Q. Was there any vessel between the 3d and the 8th? A. No, sir.

Q. Except some that took in coal to relieve the congested bunkers? A. That is all.

Q. Is it not a fact, Mr. Mills, that the imports of coal into San Francisco from Australia during the last half of 1907 and the first half of 1908 were unprecedented?

(Testimony of F. C. Mills.)

A. Yes, sir, I think there was a larger amount come in during that time, that is, as far as my memory serves me.

Q. It is a fact, is it not, that the different charterers here chartered every ship they could get hold of and rush coal in beyond your ability to handle it.

A. That I do not know about.

Q. There was a vast amount of coal that did arrive? A. Yes, sir.

Q. That caused you, in relieving the congested state of the bunkers, to hire a number of the vessels as store ships?

A. Yes, sir, on account of the congested condition on the market here, we had to do so.

Q. You have some of that coal here yet that came in during that period—a large amount of it?

A. Yes, sir.

Q. Have you any estimate, or can you estimate the number of thousands of tons that were brought in from Australia between June, 1907 and 1908?

A. No, sir, I have never given it any thought.

Q. How much Australian coal have you on storage here now?

A. I really could not say. All I attend to is simply the discharging. When that is true, I pay no attention to it.

Q. You know the number of ships that you have used for storage, now?

A. I suppose we have possibly in the neighborhood of 24,000.

Q. 24,000 tons of coal?

(Testimony of F. C. Mills.)

A. Something of that sort.

Redirect Examination.

Mr. DENMAN.—Q. As I understand your testimony, between the discharging times of these various vessels, the docks were either congested or filled with vessels taking coal out for storage?

A. Yes, sir.

Q. That filled in the interim between the 15th of January and the 20th of March when the "Columbia" was discharged? A. Yes, sir.

Q. As a matter of fact, you would very often have to take coal out of a vessel that came in for discharge, put it in your bunkers, and take that coal out of the bunkers, put it into other vessels which held the coal for storage purposes?

A. Yes, sir.

Q. At other times when you were unable to procure such bottoms, the coal had to lay in the bunkers for two or three days at a time before it could be moved or shifted to get another vessel in. That is correct, is it not? A. Yes, sir.

Recross-examination.

Mr. HUTTON.—Q. When you were discharging a vessel, you usually discharged her at the head of the wharf?

A. Do you mean alongside of the bunkers?

Q. Yes. A. Yes.

Q. The wharf is quite long, and the vessel that would take the coal out is generally down at the other end. There is room at your wharf for two vessels?

(Testimony of James B. Smith.)

A. If they are small enough. They would have to be pretty small ships to put two in there. We put barges in there, and a small ship will also go in—a ship of about 2,000 tons.

Q. But that was your practice, was it not? You would unload a vessel at one end, and put a barge at the other end. As the coal came in and was weighed, you would take it down to the end of the bunker, and put it in on the barge? A. Yes, sir.

[Testimony of James B. Smith, for the Defendant.]

JAMES B. SMITH, called for the defendant, sworn.

Mr. DENMAN.—Q. What is your business, Mr. Smith?

A. General Manager of the Western Fuel Company.

Q. What is the Western Fuel Company engaged in doing? A. Buying and selling coal.

Q. How long have you been in the coal business yourself? A. Twenty-six years.

Q. In this port? A. Yes, sir.

Q. Are you familiar with the custom of the port with regard to the discharge of coal in the port?

A. Yes, sir.

Q. Supposing there are several vessels waiting for discharge at the docks at San Francisco. What is the order in which they would be discharged?

A. Usually at the date of arrival. They will take their turn.

Q. Is there any distinction as between steam and sail?

(Testimony of James B. Smith.)

A. Yes, sir. Steamer have the preference.

Q. What is the reason for that?

A. Well, the cost of maintenance of steamers is a large amount, and they have to keep their crews and force aboard at all times. Sailing vessels can usually get along with one or two men. The expense of maintaining a sailer is very small in comparison with a steamer.

Q. Is there any difference in the rate of discharge between sailers and steamers which also is a part of the foundation of the custom?

A. Yes, sir; the discharge of steamers usually runs from 500 to 1,000 tons a day, and a sailer 100 to 200 tons a day.

Q. Now, as I understand it, the custom of the port is that steamers are discharged before sailing vessels? A. Always.

Q. And within their respective classes, vessels are discharged in the order of their arrival?

A. Yes, sir, usually.

Q. Is that the custom?

A. That is the custom; yes.

Q. Are you familiar with the custom of other ports?

A. Only at the loading ports of our mines in British Columbia. We load there aboard the vessels.

Mr. HUTTON.—I *do think* anything in British Columbia is material in this case, or the loading is material. We are dealing with the discharging.

(Testimony of James B. Smith.)

The COURT.—Let it go in, and get through with it. It is quicker that way.

Mr. DENMAN.—Q. What is the custom at these ports?

A. The same as at San Francisco. A sailer is pulled out, and the steamer put in ahead, and let her wait until the steamer is finished.

Q. Do you recollect the discharge of the steamship "Columbia" at your bunkers? A. Yes, sir.

Q. About when did she arrive in San Francisco?

A. Somewhere about January, I think. I cannot remember about dates. I have so many vessels.

Q. Did you have any discussion with her managing owner, Nelson, after her arrival regarding the vessel?

A. He came to the office to find out when the vessel would be discharged.

Q. And did he do that more than once?

A. He was at my office a dozen times, I suppose. I do not know about that particular vessel. I know he was in my office at least a dozen times.

Q. Was he there more than once in regard to the "Columbia"? A. Yes, sir, I think so.

Q. And what did he inquire?

A. When we would discharge the vessel.

Q. And what did you tell him, if you recollect?

A. That she would take her turn.

Q. Do you remember signing that contract (handing)? A. Yes, sir.

(Testimony of James B. Smith.)

Q. Do you recollect whether any vessel had discharged her cargo under that contract prior to the "Columbia"?

A. There have been quite a number, 30 or 40,000. There must have been quite a number of vessels.

Q. Was the "Columbia" the first vessel to discharge under that contract?

A. No, sir, she was not.

Q. Do you know what other vessels were discharged under it?

A. I will have to look up the list.

Q. That is in November, and the "Columbia" arrived in January.

A. This contract is in 1906—November 24th, 1906, she arrived in January, 1908. I think the "Columbia" was almost the last vessel under that contract.

Q. I was under a misapprehension as to that.

Cross-examination.

Mr. HUTTON.—Q. A steamer can always be discharged, can she not, well within her lay days. There is always abundant time in the charter to discharge her? A. No, sir.

Q. A steamer coming from Australia has always plenty of time given in the charter?

A. Not necessarily.

Q. If she went alongside the dock the next day, you can always discharge her well within the time?

A. If we have facilities and accommodation for her cargo.

Q. I am leaving that out. Suppose she goes in alongside the dock, and the next day you discharge

(Testimony of J. J. Moore.)

her, you have time to spare, provided your bunkers are clear?

A. Provided our bunkers are clear, and her rate of discharge is not too burdensome.

Q. Supposing a sailing ship is lying in San Francisco with coal, and her lay days are up, and steamer comes in, do you mean to say you would discharge the steamer first? A. Certainly.

Q. And let the lay days run on. I think that is all.

[Testimony of J. J. Moore, for the Defendant (Recalled).]

J. J. MOORE, recalled.

Mr. DENMAN.—Q. Mr. Moore, when the "Columbia" arrived in port, did you have any conversation with Mr. Smith regarding discharging her?

A. Yes, sir.

Mr. HUTTON.—I submit that would be hearsay.

Mr. DENMAN.—I want to show diligence on our part; that he went to the Western Fuel Company and tried to get the vessel discharged.

The COURT.—Proceed.

Mr. DENMAN.—Q. Did you go there more than once?

A. I spoke to him several times. I could not say whether it was at his office or at my office. I spoke to him at the club once or twice.

Q. What response did you get?

A. He said he could not tell me.

Q. What was the reason assigned?

(Testimony of J. J. Moore.)

A. Too many ships ahead of us.

Q. Did you do all you could to get her discharged at that dock? A. Yes, sir.

Cross-examination.

Mr. HUTTON.—Q. Where is the bill of lading for this coal?

A. There are three bills of lading. The Custom-House gets one, the shipowner is supposed to get another, and we generally keep one in our office.

Q. Have you got one in your office?

A. I presume so.

Q. I asked you to produce that the other day.

Mr. DENMAN.—I admit the bill of lading is in the form you plead.

Mr. HUTTON.—I should like to have it produced.

Q. You received one from Davis & Fee, with their name on the back? A. An endorsement, yes.

Q. You think it is in your office yet?

A. I presume it is, I know there is one in the Custom-House.

[Statement by Mr. William Denman, Application to Amend Answer, etc.]

Mr. DENMAN.—That is the case.

If your Honor please, the pleadings in this case were drawn on the theory, and the libel alleges, that we failed to furnish a dock. The charter-party—admitted to be the charter-party—puts on us the duty of designation of a dock, and not of furnishing a dock. That ultimately appeared to be the breach that we committed — failure to designate a dock,

That threw us on to another line of defense not disclosed by the original libel, to wit, that the congestion here prevented the designation of any dock that could be immediately used. Our evidence has been put in on that theory. It is a nice question of law whether it is an affirmative defense, or an answer to the portion of the other side's case. I desire to amend my answer, which is to the effect that the congestion of the docks prevented our furnishing a dock for the discharge of the vessel. I have drafted a form of amendment which covers that which I will read:

"That San Francisco is and has been for more than two years prior to the facts alleged in the libel, the center of distribution of coal and other supplies to interior points in California, Arizona, Nevada, Idaho, Utah, and other western States. That a large quantity of such coal comes from Australia; that in the spring and summer of 1907 sufficient stocks were ordered to supply the normal demand for these places. That in the fall of 1907 a sudden depression in the manufacturing in the States east of the Rocky Mountains caused a great lessening of the demand for Colorado coals and other coals from the more eastern States of the United States, and *threw out* employment many railway cars engaged in the carrying of such coals to such eastern manufactures, whereby large quantities of coal were diverted from the normal eastern markets and thrown upon the market for coals ordinarily supplied from San Francisco as aforesaid; that for the said reason, the said Trans-Pacific coals remained in San Francisco in large

quantities, and had accumulated there before the arrival of the ship "Columbia," overcrowding the coal bunkers and other places for the storage of coals in San Francisco.

That before the arrival of said vessel, the respondent had sold all the coals thereon to the Western Fuel Company to be delivered to said company out of the vessel and on dock. That by reason of said congestion in the bunkers and coal storage places of said port, the said Western Fuel Company had been unable to empty its bunkers so as to discharge a large number of other vessels which, under the custom of said port and the said Western Fuel Company hereafter described, preceded said "Columbia" in right of discharge.

That it is and at all times was the custom of the coal trade at said port of San Francisco, and the inflexible rule of said Western Fuel Company, to discharge coal carrying vessels arriving for discharge at any dock in said port in the order of their arrival, steamers preceding sailing vessels. That the delay in discharging the "Columbia" was due to the occupancy of said Western Fuel bunkers by said coals and the discharge of said vessels having a priority over said "Columbia." That but one of the said vessels preceding the "Columbia" had been chartered to the respondent, and that said vessel the steamer "Craighall" had arrived at said port before the "Columbia"; that no vessel chartered by the respondent had discharged any coal at said Western Fuel Company bunkers for two months prior to the arrival of the said "Columbia."

That all the coal vessels chartered by respondent which discharged at said port prior to the discharge of the "Columbia" were chartered and on the way to said port before said depression, so causing the destruction of the interior coal market as aforesaid; and that all the coal on said vessels was sold to other parties before arrival, and respondent had no power of disposition of the same after its delivery to such persons in San Francisco; that the failure to remove such coal from the bunkers and storage places in San Francisco, and the crowding of such bunkers and storage places was hindrance to the discharge of the "Columbia" beyond the control of respondent, that by reason of said facts, respondent was unable to procure or furnish a dock for the discharge of the said steamhip "Columbia" prior to the time at which she was actually discharged."

I move, if your Honor please, that the answer be amended to contain the facts set forth here, being the facts proved on the stand.

The COURT.—Let the amendment be made.

[Endorsed]: Filed November 12th, 1908. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

[Title of Court and Cause.]

Opinion.

H. W. HUTTON, Proctor for Libelants.

WILLIAM DENMAN, Proctor for Respondent.

DE HAVEN, District Judge.—This is an action brought by the owners of the ship "Columbia," to recover $3,264.42, as demurrage for an alleged de-

lay of 42 days in unloading that vessel, under a charter-party entered into between the managing owner of the ship and the respondent corporation, on June 26, 1907. The "Columbia" carried, under this charter, a cargo of coal for respondent from Newcastle, Australia, to the port of San Francisco, arriving in the latter port on January 14, 1908, and on the next day her master gave notice to respondent, who was also the holder of the bill of lading of the vessel's arrival, and readiness to discharge, and her managing owner was informed, by the respondent, that the cargo carried by her had been sold to the Western Fuel Company, and that the ship "would dock at the bunkers of that company"; that the bunkers, of that company were crowded and that the vessel would probably be delayed three or four weeks before she could reach the place of discharge. The vessel, however, was not given a berth at the bunkers, referred to, until March 19, 1908.

The reason for this delay seems to have been that prior to that date the bunkers were continuously occupied by cargoes and vessels which had arrived in the port of San Francisco, prior to the "Columbia," and it was the general practice of the Western Fuel Company to discharge vessels in the order of their arrival in port; although it appears from the evidence that during the time the "Columbia" was delayed, one schooner, which arrived in port after her, was permitted to discharge 300 tons of cargo at these bunkers. But with this exception, the practice of the Western Fuel Company, in discharging vessels, was to discharge them in the order of their

arrival. The "Columbia," after reaching the berth assigned her, was discharged at the rate specified in the charter, and the delay of which she complains is that which occurred prior to reaching the berth at which she discharged her cargo.

1. The question for decision here is whether the libelants are, by the terms of the charter-party, entitled to recover demurrage for the delay in discharging the cargo of the "Columbia," under the circumstances above stated.

The charter-party first provides that the vessel shall load a full and complete cargo of coal at New Castle, and then proceeds:

" * * * and being so loaded shall therewith proceed to San Francisco harbor, California, to discharge at any safe wharf or place within the Golden Gate and deliver the full and complete cargo, in the usual and customary manner at any safe wharf or place or into crafts alongside as directed by consignee." * * *

"Frost or floods * * * or any other hindrance of what nature soever beyond the Charterers' of their Agents' control, throughout this Charter, always excepted." * * *

"To be discharged as customary, in such customary berth as consignees shall direct, ship being always afloat, and at the average rate of not less than 150 tons per weather working days (Sundays and holidays excepted), to commence when the ship is ready to discharge, and notice thereof has been given by the Captain in writing; if detained over and above

the said laying days, demurrage to be at 3d. per register ton per day."

It will be seen that by the terms of the charter, the respondent, as consignee, had the option to direct the vessel to deliver her cargo at any safe wharf or place, within the Golden Gate, or in craft alongside; and I think the evidence shows that the respondent exercised this option on the 15th day of January, 1908, by informing the managing owner of the "Columbia" that the cargo of the vessel had been sold to the Western Fuel Company, and that she was to be docked at that company's bunkers; although formal written notice directing the master to repair to a berth there provided for the ship was not given until March 16, 1908. The fact that the coal bunkers occupied three separate piers does not render the notice of the place of discharging insufficient, as the bunkers were under one management, and the master of the vessel must have understood that the ship was to be assigned to the first vacant berth, at one of the parallel piers, and no more specific designation was requested.

It is the settled rule that the lay days, named in the charter or the bill of lading within which the ship is entitled to deliver her cargo, do not commence to run until she has arrived at her destination, that is, until she has reached the place where she has contracted to deliver her cargo; and until her voyage has been thus completed, there is no obligation upon the part of the charterer or consignee to discharge her, and the vessel is not entitled to give notice of readiness to discharge.

In Leonis Steamship Company, Limited vs. Rank. Limited, 1 King Bench Division, 1908, 499, the rule for determining when a ship is an "arrived ship," that is, when it may be said the ship has completed the carrying voyage, is thus stated by Kennedy, L. J.:

"Now, the answer to the inquiry whether the ship can or cannot properly be described as an 'arrived' ship obviously depends upon the point which the parties have chosen to designate in the charter-party as the destination. The degree of precision is purely a matter of agreement between them. In practice, the destination is generally one of the following: (1) A Port; (2) a specified area within a port, such, e. g., as a basin, a dock, or a certain distance or reach of shore on the seacoast or in a river; or (3) the still more limited and precise point where the physical act of loading is to take place, as, e. g., a particular quay, pier, wharf or spout, or (where the operation is to be performed by means of lighters, and the ship is not to be in a shore berth) a particular mooring. In each of the last two cases—(2) and (3)—it is settled law that the point of destination is equally to be treated as designated in the charter-party, whether the point be named in the document by its local title or there is in the charter-party an express reservation to the charterer of the privilege to fix the point of destination by his order or direction."

Now, as already stated, the "Columbia" was, upon her arrival at San Francisco, seasonably directed, by respondent, to deliver her cargo at the bunkers of

the Western Fuel Company. This direction was given in the exercise of a right given by the charter-party, and under the rule stated in the case just cited, the place so designated is to be regarded as if specifically named in the charter-party, as the place of delivery; and this being so, it must be held, under the authorities, that the voyage of the "Columbia" did not terminate until she reached the berth to which she was directed, and she was not, within the meaning of the charter-party, ready to deliver her cargo, or entitled to give notice of her readiness to do so, until that time.

Tharsis Sulphur and Copper Co., Limited, vs. Morel Brothers, and Company, etc., 2 Queen's Bench Division, 647.

Murphy vs. Coffin, 12 Queen's Bench Division, 87.

In the first of the cases last cited, the question arises in an action to recover demurrage under a charter-party which obligated the ship to proceed to Mersey, or so near thereto as she might safely get, and deliver her cargo "at any safe berth as ordered on arrival in the dock at Garston."

The vessel was ordered to a particular berth which she was not able to reach for some time on account of its crowded condition, but it was held that the obligation of the charterer to unload did not commence until the vessel was in the berth ordered.

The case of Murphy vs. Coffin, 12 Q. B. D. 87, was an action for demurrage. The charter-party provided that the ship was to proceed to a named port and there deliver her cargo "along consignees' or

railway wharf or into lighters * * * as ordered." The vessel arrived at the port of destination and was ordered to discharge at the railway wharf, but as all of the discharging berths were crowded at that time, she was not berthed at the railway wharf until 24 hours after her arrival in the dock. It was held that the vessel was not entitled to recover for this delay. The decision of the Court was put upon the ground that the lay days named in the charter did not commence to run until the termination of the voyage, and that the voyage did not terminate until she was actually in the berth to which she had been directed.

Mathew, J., in delivering the opinion of the Court said:

"It is the ordinary and reasonable rule that the lay days under a charter-party do not begin to run until the vessel has arrived at her place of destination. The charter-party here seems to have been framed in the hope of avoiding the questions which have arisen in numerous cases as to the respective rights and liabilities of shipowners, charterers, and consignees with respect to the discharge of cargo where the place of destination is a dock. The vessel is to load, proceed to Dieppe, and deliver her cargo 'alongside consignees' or railway wharf, or into lighters, or any vessel or wharf where she may safely deliver, as ordered.' The place of destination is, therefore, such one of these places as the charterers may order. When the vessel arrived in the dock at Dieppe she was ordered to discharge at the railway wharf, which was then occupied by other

vessels, so that there was no berth vacant for her, and it was not until she obtained one that she was in a position to discharge her cargo. * * * I am of opinion that the railway wharf was the only place of destination under the charter-party; that the lay days did not begin to run until the vessel had secured a berth there."

In my opinion the rule announced in the foregoing cases is sound; and is therefore to be followed in the decision of this case.

2. But it is further urged, in behalf of the libelant, that, conceding that the charter-party gave to the respondent the option of naming the berth for the delivery of her cargo, that it was not authorized to name the wharf which the vessel could not reach without the long delay occurring in this case, in other words, the contention of the libelant is, in effect, that the charter-party should be construed as only giving the charterer the option to name a ready berth, but I am satisfied, notwithstanding what was said in Williams vs. Theobold, 15 Fed. 465, that the Court is not authorized to import such words into the contract.

As said by Bowen, L. J., in construing a similar provision in the charter-party, under consideration in Tharsis Sulphur and Copper Co. vs. Morel Brothers & Co., 2 Q. B. D. 746:

"Then we were told that an option was given to the charterer, and that it was not properly exercised unless a berth was chosen that was empty. But I think there was a confusion in this argument also. The option is given for the benefit of the person who

has to exercise it. He is bound to exercise it in a reasonable time, but is not bound in exercising it to consider the benefit or otherwise of the other party. The option is to choose a port or berth or dock, that is, one that is reasonably fit for the purpose of delivery. * * * To limit the option of the charterer by saying that, in the choice of a berth, he is to consider the convenience of the shipowner, is to deprive him of the benefit of his option. The most that can be said is that the charterer does not exercise his option at all unless he chooses a berth that is free or is likely to be so in a reasonable time."

In the construction of charter-parties, or bills of lading, it is well to keep in mind what was said by Judge Brown in the case of Fish vs. One Hundred and Fifty Tons of Brownstone, 20 Fed. 201:

"It is in the power of the vessel always to provide against any loss on her part through detention from accidental causes at the place of discharge, if such be the intention of the parties, by inserting in the bill of lading the time within which the cargo must be received, or by other familiar provisions, such as that the vessel shall 'dispatch' or 'quick dispatch' either of which would cast the risk of delay upon the consignee."

This language is particularly applicable here. The charter-party was made in view of the fact that many vessels were, or might be engaged in the carriage of cargoes of coal to the port of San Francisco, and where many vessels are entering a port of discharge, the fact that there may be, at some time, a congestion in the facilities of discharge, be-

cause the wharves cannot accommodate all of the ships, ready to discharge at the same time, is not so remote a contingency that it ought not to be guarded against in the contract of carriage, if it is the intention of the parties that the charterer or consignee shall assume the risk of delay from such a cause. This can be done in the manner suggested in the above quotation, or by the insertion of other apt words, in the charter or bill of lading, such as that lay days shall commence when vessel 'is ready to unload and written notice given, whether in berth or not," which were held sufficient for that purpose in W. K. Nivee Coal Co. vs. Cheronea, S. S. Co., 142 Fed. 402.

The wharf to which the "Columbia" was ordered, by respondent, was not free, and the ship was delayed on that account for a period of forty-two days, but the Court cannot say that the action of the respondent was arbitrary or unreasonable, and therefore not within both the letter and spirit of the charter. The option given appears to have been exercised in good faith, for respondent's benefit, and this is all that the charter requires, in the matter of designating the place of discharge. The language of the Court in Evans vs. Blair, 114 Fed. 616, is applicable here.

After referring to the cases of Murphy vs. Coffin, 12 Q. B. D. 87; Copper Co. vs. Morel (1891), 2 Q. B. Div. 647, above cited, the Court said:

"The result of this class of cases, after some fluctuation, has been to leave the consignee a somewhat unlimited power in the matter of selecting the

berth, regardless of its crowded state, provided, only, it is a safe one. This, however, comes from the fact that the charter-party, or bill of lading, contained express language favorable to the consignee, and from the application of the well-known rule that where, in maritime contracts, parties have seen fit to choose fixed forms of expression, the great variety of contingencies incidental to maritime transactions disenable the Courts from establishing any safe theory by which the letter can be modified to meet any supposed intent."

It follows from these views that the libel must be dismissed, and it is so ordered.

[Endorsed]: Filed Aug. 31, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Title of Court and Cause.]

Final Decree.

This cause coming on duly to be heard, the libelants, being represented by H. W. Hutton, Esq., and the respondent by William Denman, Esq., and proof being offered by both parties, and said cause being argued, briefed and submitted:

It is hereby ordered, adjudged and decreed, that the libelants take nothing by their libel herein, that the said libel be dismissed, and that the respondent have judgment, for its costs to be taxed.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Sep. 4, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Title of Court and Cause.]

Assignment of Errors.

The libellants and appellants in said cause specify the following as the errors committed by the District Court of the United States in and for the Northern District of California, in its decision and decree in said cause.

(1) The said Court erred in filing and deciding that the managing owner of the ship "Columbia" was notified by the respondent on the 15th day of January, 1908, or upon any day prior to March 16th, 1908, that the said ship would discharge her cargo at the bunkers of The Western Fuel Company in San Francisco or where she would discharge.

(2) The said vessel erred in filing and deciding that the master of the ship "Columbia" must have understood or did understand that that ship was to be assigned to the first vacant berth, at one of the parallel piers, of The Western Fuel Company, and that no more specific designation was requested.

(3) The said Court erred in finding and deciding that a vessel, and the ship "Columbia" was not entitled to give notice of her readiness to discharge until she arrived at the place designated by the respondent to discharge her cargo.

(4) The Court erred in finding and deciding that the *voyage the* ship "Columbia" in this case "did not terminate until she had reached the berth to which she was directed."

(5) The said Court erred in finding and deciding that the ship "Columbia" "was not within the mean-

ing of the charter-party ready to deliver her cargo" until she had arrived at a discharging place within the Port of San Francisco, designated by the consignee.

(6) The said Court erred in finding and deciding that the owners of the ship "Columbia" were not entitled to give notice of the readiness of that vessel to discharge her cargo until she had reached the berth where she was directed by the respondent to discharge.

(7) The said Court erred in finding and deciding that the respondent in this case was authorized to direct the ship "Columbia" to discharge at any but a ready berth.

(8) The Court erred in finding and deciding that the charter-party in this case was made in view of the fact that many vessels were or might be engaged in the carriage of cargoes of coal to the port of San Francisco.

(9) The said Court erred in finding and deciding that the delay of forty-two days in the unlading of the ship "Columbia" was neither arbitrary or unreasonable.

(10) The said Court erred in finding and deciding that the claimed option of the respondent as to the direction of where the ship "Columbia" should unload was exercised in good faith.

(11) The said Court erred in finding and deciding that it is the settled or at all the rule that the lay days named in the charter-party in this cause within which the ship "Columbia" was entitled to deliver her cargo did not commence to run until she had

reached the wharf of the Western Fuel Company where she was finally discharged.

(12) The said Court erred in finding and deciding that there was no obligation on the part of the respondent to discharge the ship "Columbia" in this case until she had reached the wharf or bunkers of the Western Fuel Company where she was finally discharged.

(13) The said Court erred in dismissing libellants' libel.

(14) The said Court erred in finding and deciding that the libellants herein were in any way affected by any rule of The Western Fuel Company in the discharge of vessels.

(15) The said Court erred in not awarding judgment for the libellants for the amount prayed for in their libels herein.

(16) The said Court erred in not finding and deciding that the ship "Columbia" and her owners and master had done all that they were required to do when they gave written notice of the readiness of that vessel to discharge in so far as she was able without the co-operation of the respondent. .

(17) The said Court erred in not finding and deciding that the delay of the ship "Columbia" in this case was unreasonable.

(18) The said Court erred in not finding and deciding that it was the duty of the respondent to discharge the ship "Columbia" without any sale of her cargo to the Western Fuel Company.

(19) The said Court erred in not finding and deciding that it was the duty of the respondent to

immediately, upon the receipt of the notice that the ship "Columbia" was ready to discharge, name a berth where she could at once discharge.

(20) The said Court erred in not finding and deciding that it was the duty of the respondent herein to at once discharge the ship "Columbia" when it received notice of her readiness to discharge.

(21) The said Court erred in not finding and deciding that it was the fault of the respondent herein that the ship "Columbia" was not discharged within the lay days named and mentioned in her charter-party herein.

(22) The said Court erred in not finding and deciding that the congestion of coal in San Francisco while the ship "Columbia" was waiting to be discharged was the fault of the respondent herein.

(23) The said Court erred in not finding and deciding that the unloading of the schooner "J. H. Lunsmann," and the steamer "Camphill" by the Western Fuel Company was not the proximate cause of the detention of the ship "Columbia" herein, and that the respondent herein was responsible for their being so unloaded, and for the detention of the said ship "Columbia."

(24) The said Court erred in not finding and deciding that the voyage of the ship "Columbia" herein ended, so far as she was concerned, when she had anchored in the port of San Francisco and the master thereof had given written notice to the respondent that the said vessel was ready to discharge her cargo.

(25) The said Court erred in not finding and deciding that the libellants were not in any way affected by the purported sale of the cargo of the ship "Columbia" to the Western Fuel Company.

(26) The said Court erred in not finding and deciding that it was the duty of the respondent herein to discharge the cargo of the ship "Columbia" herein, in lighters if it could not otherwise be discharged without detaining the said ship.

(27) The Court erred in making and rendering the opinion filed here on the —— day of September, 1909.

(28) The said Court erred in not finding and deciding that the lay days of the ship "Columbia" commenced when the notice of her readiness to discharge was given on the 16th day of January, 1908, under the following language in the charter-party herein, to wit: "to commence when the ship is ready to discharge, and notice thereof has been given by the captain in writing."

(29) The said Court erred in not finding and deciding that the ship "Columbia" was not ready to discharge herein, on the 16th day of January, 1908.

In order that the foregoing assignments of error may be and appear of record, the libellants herein file and present the same to the Court, and pray that such disposition be made thereof as is in accordance with the law in such cases made provided, and said libellants pray a reversal of the above-mentioned decree heretofore made herein, and for judgment as

prayed for in their amended and supplemental libels herein.

Dated San Francisco, September 22d, 1909.

H. W. HUTTON,
Proctor for Libellants and Appellants.

Copy received this 22d day of September, 1909.

WILLIAM DENMAN,
Proctor for Respondent.

[Endorsed]: Filed Sept. 22d, 1909. Jas. P. Brown, Clerk. By M. Thomas Scott, Deputy Clerk.

[Title of Court and Cause.]

Notice of Appeal.

The respondent above named and its proctor will please take notice, that the libellants in said cause hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the decree given and made by the above-named district Court, on the 4th day of September, 1909, dismissing libellants' libel, and from each part of said decree and the whole thereof.

Dated September 13th, 1909.

H. W. HUTTON,
Proctor for Libellants and Appellants.

Copy received this 14th day of September, 1909.

WILLIAM DENMAN,
Per W. B. ACTON,
Proctor for Respondent.

[Endorsed]: Filed Sept. 14th, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Title of Court and Cause.]

Stipulation [for Transmission of Original Exhibits to United States Circuit Court of Appeals].

It is hereby stipulated and agreed that the original exhibits in said cause shall be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit, and the Clerk of the United States District Court need not make copies thereof.

Dated October 14th, 1909.

H. W. HUTTON,
Proctor for Libellant and Appellant.
WILLIAM DENMAN,
Proctor for Respondent and Appellee.

[Endorsed]: Filed Oct. 14, 1909. Jas. P. Brown, Clerk. By M. Thomas Scott, Deputy Clerk.

[Certificate of Clerk United States District Court to the Apostles.]

United States of America,
Northern District of California,—ss.

I, Jas. P. Brown, Clerk of the District Court of the United States of America, for the Northern District, do hereby certify that the foregoing and hereunto annexed one hundred and thirteen pages, numbered from 1 to 113, inclusive, with the accompanying exhibits, ten in number, contain a full and true transcript of the records in the said District Court, made up pursuant to subdivision 1 of Rule 4, of Admiralty, of the United States Circuit Court of

Appeals for the Ninth Circuit, and the instructions of H. W. Hutton, Esquire, Proctor for Libelants and Appellants, in the case of Andrew Anderson, Henry Nelson et al., vs. J. J. Moore and Company, a corporation, No. 13,767.

I further certify that the costs of preparing and certifying to the foregoing Transcript of Appeal is the sum of Fifty-five Dollars and Forty cents ($55.40), and that the same has been paid to me by H. W. Hutton, Proctor for Libelants and Appellants.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 6th day of January, A. D. 1910, and of the Independence of the United States the one hundred and thirty-fourth.

[Seal] JAS. P. BROWN,
Clerk.

[Endorsed]: No. 1808. United States Circuit Court of Appeals for the Ninth Circuit. Andrew Anderson, A. Anderson Company (a Corporation), John J. Beaton, Angus Beaton, Edward Carlsen, Harry F. Chase, Malcolm P. Chase, L. Chase, Samuel B. Chase, Mary L. Chase, Wm. B. Chase, Junior, Dorothy M. Chase, Fred J. Chase, George Boole (a Corporation), Mrs. E. G. Boole, Henrietta W. Hobbs, E. W. Hobbs, Clarcance W. Hobbs, Edward Henrix, Margaret J. Wall, Marion B. Waldron, and Henry Nelson, Libelants, Appellants, vs. J. J. Moore & Company (a Corporation), Appellee. Apostles on Appeal. Upon Appeal from the United States Dis-

trict Court for the Northern District of California.
Filed January 6, 1910.

F. D. MONCKTON,
Clerk.

[Certificate of Clerk United States District Court to the Original Exhibits.]

United States of America,
Northern District of California,—ss.

I, Jas. P. Brown, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify, that the annexed documents, ten in number, are the Original Exhibits, introduced and filed at the hearing of the case of Andrew Anderson, Henry Nelson et al. vs. J. J. Moore and Company, a corporation, No. 13,767, and are herewith transmitted to the Circuit Court of Appeals, of the United States, for the Ninth Circuit, as per stipulation, filed in this office and embodied in the Apostles on Appeal, transmitted herewith, and which said Exhibits are known as and marked:

Libelant's Exhibit No. "A," "B," "C," "D," "E," "F," "G" (various letters).

Libelant's Exhibit No. H (Coal Contract).

Defendant's Exhibit No. 1 (Letter).

Defendant's Exhibit No. 2 (List of "Columbia" lay days).

In witness whereof, I have hereunto set my hand and affixed the Seal of said District Court, this 6th day of January, A. D. 1910.

[Seal] JAS. P. BROWN,
Clerk.

[Libelants' Exhibit "A."]

Received

Jan. 15, 1908.

Ans.————12 M.

J. J. Moore & Co.

W. M.

San Francisco, Cal., Jan. 15, '08.

Messrs. J. J. Moore & Co.,
215 Pine Street,
City.

Gentlemen: Please be advised that the ship "Columbia," consigned to your good selves, has arrived at this port, and entry effected at Custom House.

Vessel is awaiting your orders, and lay days will commence as per charter party.

Respectfully yours,
HENRY NELSON,
Managing Owner.

[Endorsed]: No. 13,767. Anderson vs. J. J. Moore & Co. Libelants' Exhibit "A." Jas P. Brown, Clerk. By Francis Krull, Deputy Clerk.

No. 1808. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelants' Exhibit "A." Received Jan. 6, 1910. F. D. Monckton, Clerk.

[Libelants' Exhibit "B."]

San Francisco, Jan. 18, 1908.

Messrs. J. J. Moore & Co.,
215 Pine St., City.

Gentlemen: You will please take notice that as per notice served upon you January 15, 1908, the Ship "Columbia" has arrived at San Francisco and has been ready to discharge on and since said 15th day of January.

Please procure and advise me of place of discharge.

Demurrage will be charged as per charter party.

Respectfully yours,
HENRY NELSON,
Managing Owner Ship "Columbia."

[Endorsed]: No. 13,767. Anderson vs. J. J. Moore & Co. Libelants' Exhibit "B." Jas P. Brown, Clerk. By Francis Krull, Deputy Clerk.

No. 1808. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelants' Exhibit "B." Received Jan. 6, 1910. F. D. Monckton, Clerk.

[Libelants' Exhibit "C."]

[Letterhead of J. J. Moore & Co.]

San Francisco, Cal., March 16th, 1908.

Henry Nelson, Esq.,
Managing Owner Ship "Columbia,"
San Francisco, Cal.

Dear Sir: Will you please have the "Columbia" docked at the bulkhead berth alongside the Folsom St. bunkers of the Western Fuel Co. on the tide which

serves about 11 o'clock tomorrow morning, and have everything in readiness to commence discharge as soon as the vessel is docked.

Yours faithfully,
J. J. MOORE & CO.,
Wm. Mainland,
Secretary.

[Endorsed]: No. 13,767. Anderson vs. J. J. Moore & Co. Libelants' Exhibit "C." Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. No. 1808. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelants' Exhibit "C." Received Jan. 6, 1910. F. D. Monckton, Clerk.

[Libelants' Exhibit "D."]

[Letter-head of J. J. Moore & Co.]

San Francisco, Cal., Feb. 3rd, 1908.

Dic. J. J. M.

H. W. Hutton, Esq.,
Atty-at-Law,
527 Pacific Bldg., City.

Dear Sir: We beg to acknowledge receipt of your favor of the 1st inst. addressed to the subscriber, and in reply thereto will say that you have been misinformed regarding the laydays of the Ship "Columbia." They are not as yet up, nor will they be for some days to come. When the vessel is discharged her demurrage will be treated in the usual and customary way.

We are, Dear Sir,
Yours faithfully,
J. J. MOORE & CO.,
J. J. MOORE,
President.

[Endorsed]: No. 13,767. Anderson et al. vs. J. J. Moore & Co. Libelants' Exhibit "D." Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

No. 1808. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelants' Exhibit "D." Received Jan. 6, 1910. F. D. Monckton, Clerk.

[Libelants' Exhibit "E."]

[Letter-head of H. W. Hutton.]

Received
Feb. 3, 1908.
Ans. Yes.
J. J. Moore & Co.

San Francisco, February 1st, 1908.

J. J. Moore, Esq.

My Dear Sir: Captain Nelson the managing owner of the "Columbia" has requested me to write you about demurrage on that vessel, it appears she arrived January 15th was ready to discharge that day, and no cargo has been taken out of her *yet*.

She would have been fully discharged today, or Monday next if the *charty* party had been lived up to, assuming this to be a non-working day.

He has instructed me to make a demand on you for demurrage, kindly advise me whether demurrage will be paid by you without legal proceedings and oblige.

Yours Very Truly,

H. W. HUTTON.

[Endorsed]: No. 13,767. Anderson et al. vs. J. J. Moore & Co. Libelants' Exhibit "E." Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

No. 1808. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelants' Exhibit "E." Received Jan. 6, 1910. F. D. Monckton, Clerk.

[Libelants' Exhibit "F."]

[Letter-head of H. W. Hutton.]

Ans.

San Francisco, February 8th, 1908.

J. J. Moore & Co.

Gentlemen: Mr. Nelson, the managing owner of the "Columbia" has requested me to again write you about that vessel, he says the lay days were up yesterday the 7th at 12 noon,

He wishes to sharter the vessel, and if he does not get her soon his chances will probably be gone, as he is unable to fix a date when he can deliver her for loading.

He also wishes payment of demurrage now due, kindly advise me what you will do about it and oblige.

Yours Very Truly,

H. W. HUTTON.

Received

Feb. 10, 1908.

Ans.————

J. J. Moore & Co.

[Endorsed]: No. 13,767. Anderson et al. vs. J. J. Moore & Co. Libelants' Exhibit "F." Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

No. 1808. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelants' Exhibit "F." Received Jan. 6, 1910. F. D. Monckton, Clerk.

[Libelants' Exhibit "G."]

[Letter-head of J. J. Moore & Co.]

(Dic. J. J. M.)

San Francisco, Cal., Feb. 10th, 1908.

H. W. Hutton, Esq.,
Pacific Bldg.,
City.

Dear Sir: We beg to acknowledge receipt of your favor of the 8th inst. re Bark "Columbia," and in reply thereto will say that it is in error to state the laydays of this vessel were up on the 7th. Under the most favorable circumstances, in consideration of the Charter Party, they will not expire before the night of Thursday, the 13th inst., and we further beg to advise you that the matter will be handled as customary, when the time arrives.

We note that unless the vessel was turned over to the owners soon the chances of fixing her would be gone. The last time we saw Captain Nelson he informed us the vessel was fixed to go to Alaska next March-April, consequently that she would not be needed until then. However, be this as it may, the vessel will be discharged in her turn, as customary.

We are, Dear Sir,
Yours faithfully,
J. J. MOORE & CO.
J. J. MOORE,
President.

[Endorsed]: No. 13,767. Anderson et al. vs. J. J. Moore & Co. Libelants' Exhibit "G." Jos. P. Brown, Clerk. By Francis Krull, D. C.

No. 1808. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelants' Exhibit "G." Received Jan. 6, 1910. F. D. Monckton, Clerk.

[Libelants' Exhibit "H."]

COAL CONTRACT.

San Francisco, Nov. 24, 1906.

Kind of Coal — DOUBLE SCREENED STANFORD MERTHYR COAL.

Name of Vessels—TO BE NAMED FROM TIME TO TIME.

Shipment — TO BE SHIPPED DURING 1906 AND 1907 AT A RATE OF ABOUT ONE STEAMER LOAD PER MONTH.

Quantity — THIRTY TO FORTY THOUSAND (30/40,000) TONS.

Price—SEVEN DOLLARS per ton of 2240 lbs., landed on wharf here, duty paid.

Payable, cash in U. S. gold coin on delivery according to U. S. Custom House weights.

Buyer to designate the discharging berth, where vessel can lie in safety, and agrees to receive Coal at an average rate of not less than 500 tons per working day.

Lay days to commence in 12 hours steamers 3 days sailers after notice that vessel has entered at Custom House, unless vessel is docked sooner.

Vessel to pay 6¼ cents per ton, the customary half weighing charge.

Purchaser to have option free of expense of moving vessel once during discharge.

State Harbor tolls payable by purchaser.

Any alteration in present rate of duty to be for or against the purchaser.

Seller not responsible for shipment of Coal, should this be impracticable through strikes, lockouts or accidents at the Collieries.

Should the vessel named be lost, this contract to be void, in proportion to amount of cargo aboard.

Buyer is entitled to the following reductions:

~~Six cents per ton if the cargo is discharged at the rate of 150 tons per working lay day.~~

~~Twelve cents per ton if the cargo is discharged at the rate of 200 tons per working lay day.~~

Nine cents per ton if the vessel is free from dockage, or if the dockage expenses are paid by buyer, while the vessel is engaged in unloading all or any portion of this cargo.

REMARKS:

BUYERS TO HAVE ALL THE PRIVILEGES OF THE CHARTER-PARTY.

SELLER: J. J. MOORE & CO.

J. J. MOORE,

President.

BUYER: WESTERN FUEL CO.

JAMES B. SMITH,

Vice-President.

* * * * * * * *

[Endorsed]: Western Fuel Co. Nov. 24/06. 1906-1907 Coal Contract. C. 48. No. 13,767. Anderson vs. J. J. Moore & Co. Libelants' Exhibit No. "H." Jas. P. Brown, Clerk. By Francis Krull.

No. 1808. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelants' Exhibit "H." Received Jan. 6, 1910. F. D. Monckton, Clerk.

[Defendant's Exhibit No. 1.]

[Letter-head of J. J. Moore & Co.]

San Francisco, Cal., Oct. 15, 1908.

Mr. Wm. Denman,

San Francisco, Cal.

Anderson vs. J. J. Moore.

"COLUMBIA"

Dear Sir: In an answer to yours of even date,—

(a) The following are the colliers J. J. M. & Co. had in the port of San Francisco for two months prior to Jan. 15, 1908.—

S. S. "Craighall"—Arrived Nov. 9/07. Commenced discharge at Oakland Long Wharf Nov. 12/07. Finished discharge Nov. 23, 1907. Cargo sold to Western Fuel Co.

S. S. "Jethou"—Arrived Nov. 15/07. Commenced discharge at Beale St. Nov. 21/07, and finished Nov. 30/07. Cargo was sold to the Pacific Coast Co.

S. S. "Riverdale"—Arrived Decr. 30/07. Commenced discharge at Beale St. Decr. 27/07, and finished Jan. 3/08. Cargo was sold to the Pacific Coast Co.

S. S. "Camphill"—Arrived Jan. 10/08. Commenced discharge at Mission St. Feb. 6/08, and finished Feb. 13/08. Cargo went to Western Fuel Co.

(b) The following are the weather working days Jan. 15/08 to Feb. 15/08,—January 15, 16, 17, 21, 22, 27, 28, 30, 31, February 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15.

Yours faithfully,

J. J. MOORE & CO.

W. M.

[Endorsed]: No. 13767. Anderson vs. J. J. Moore & Co. Defendant's Exhibit No. 1. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

No. 1808. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "1." Received Jan. 6, 1910. F. D. Monckton, Clerk.

[Defendant's Exhibit No. 2.]

[Letter-head of Western Fuel Company.]

(1)

San Francisco, 1908.

"COLUMBIA" Laydays.

2220 Tons @ 150 tons daily—15 days for discharging.

January	14.	Arrived late	
"	15.	Lying in Stream—Received notice at noon, ship entered at Custom House.	
"	16.	"	
"	17.	"	Raining
"	18.	"	"
"	19.	"	Sunday
"	20.	"	Raining

"	21.	"	"
"	22.	"	
"	23.	"	Raining
"	24.	"	"
"	25.	"	"
"	26.	"	Sunday
"	27.	"	
"	28.	"	
"	29.	"	Raining
"	30.	"	
"	31.	"	

(2)

February	1.	Lying in Stream—Raining.	
"	2.	"	Sunday
"	3.	"	
"	4.	"	Raining.
"	5.	"	
"	6.	"	
"	7.	"	
"	8.	"	
"	9.	"	Sunday
"	10.	"	
"	11.	"	
"	12.	"	
"	13.	"	
"	14.	"	
"	15.	"	
"	16.	"	Sunday
"	17.	"	
"	18.	"	
"	19.	"	
"	20.	"	

(3)

February	21.	Lying in Stream	
"	22.	"	
"	23.	"	Sunday
"	24.	"	
"	25.	"	
"	26.	"	
"	27.	"	
"	28.	"	
"	29.	"	
March	1.	"	Sunday
"	2.	"	
"	3.	"	
"	4.	"	
"	5.	"	
"	6.	"	
"	7.	"	
"	8.	"	Sunday
"	9.	"	
"	10.	"	
"	11.	"	
"	12.	"	

(4)

March	13.	Lying in Stream	
"	14.	"	
"	15.	"	Sunday
"	16.	"	
"	17.	"	
"	18.	Docked at Folsom St. Bunkers and commenced discharging.	
"	19.	"	
"	20.	Finished discharging at 1 P. M.	

[Endorsed]: No. 13,767. Anderson vs. J. J. Moore & Co. Defendant's Exhibit No. 2. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

No. 1808. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "2." Received Jan. 6, 1910. F. D. Monckton, Clerk.

No. 1808

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

ANDREW ANDERSON et al.,
Libelants, Appellants,

vs.

J. J. MOORE & COMPANY,
(a corporation),
Respondent, Appellee.

BRIEF FOR APPELLANTS.

H. W. HUTTON,
E. B. MCCLANAHAN,
S. H. DERBY,
Proctors for Appellants.

Filed this.....day of February, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

No. 1808

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

ANDREW ANDERSON et al.,
Libelants, Appellants,

vs.

J. J. MOORE & COMPANY,
(a corporation),
Respondent, Appellee.

BRIEF FOR APPELLANTS.

This is an appeal from a decree of the District Court for the Northern District of California, dismissing a libel for demurrage.

Statement of Facts.

Libelants are the owners of the American ship "Columbia". On June 26th, 1907, she was chartered in San Francisco to the respondent for a round voyage via Newcastle, N. S. W. By the terms of the charter, the vessel was to take on a cargo of coals at Newcastle and then proceed to San Francisco. The material parts of the charter in this case are the following:

"* * * And being so loaded shall therewith " proceed to San Francisco harbor, Cal., to dis- " charge at any safe wharf or place within the Gol- " den Gate and deliver the said full and complete " cargo in the usual and customary manner, at any " safe wharf or place or into Craft alongside as di- " rected by Consignees.

* * * * * * *

" Frost or floods * * * or any other hindrance " of what nature soever beyond the Charterers' or " their agents' Control, throughout this Charter, al- " ways excepted.

* * * * * * *

" To be Discharged as customary, in such custo- " mary berth as consignees shall direct, ship being " always afloat, and at the average rate of not less " than 150 tons per weather working days (Sundays " and holidays excepted), to commence when the " ship is ready to discharge, and notice thereof has " been given by the Captain in Writing; If detained " over and above the said laying days, demurrage to " be at 3d. per register ton per day."

The "Columbia" duly arrived in San Francisco harbor on January 14th, 1908, and on January 15th notice was given respondent, which was both charterer and consignee, as follows:

"San Francisco, Cal., Jan. 15, '08.

" Messrs. J. J. Moore & Co.,

" 215 Pine Street,

" City.

" Gentlemen : Please be advised that the ship " 'Columbia' consigned to your good selves, has ar-

" rived at this port, and entry effected at Custom " House.

" Vessel is awaiting your orders, and lay days will " commence as per charter party.

"Respectfully yours,

"Henry Nelson,

" Managing Owner."

On the same day the master called at respondent's office and asked where he was to discharge. According to his uncontradicted evidence, "They said they "did not know and furthermore they said there would "not be anything done for three or four weeks to "come" (28). Captain Nelson, the managing owner of the "Columbia", also called at the office and, according to his statement, he too was told nothing as to his discharging place (37), though Mr. Moore testifies that, two days after the ship's arrival, he told Nelson "that the cargo of coal was sold to the Western Fuel "Company, and the ship would dock at their bunk- "ers" (51). At about this same time it also appears that Mr. Moore made a proposition to Captain Nelson to keep his vessel for storage purposes, but they could not agree upon the terms (35-36).

On January 18th a second notice was sent by Captain Nelson to the respondent as follows:

" San Francisco, Jan. 18, 1908.

" Messrs. J. J. Moore & Co.,

" 215 Pine St., City.

" Gentlemen: You will please take notice that as " per notice served upon you January 15, 1908, the

" Ship 'Columbia' has arrived at San Francisco and " has been ready to discharge on and since said 15th " day of January.

"Please procure and advise me of place of dis- " charge. Demurrage will be charged as per charter " party.

"Respectfully yours,

"HENRY NELSON,

"Managing Owner Ship 'Columbia'."

On February 1st, the ship still being in the stream, Nelson's attorney wrote to respondent, calling attention to the fact that the lay days were about up and asking whether demurrage would be paid without legal proceedings. To this letter respondent replied on February 3rd:

"San Francisco, Cal., Feb. 3rd, 1908.

" H. W. Hutton, Esq.,

"Atty.-at-Law,

"527 Pacific Bldg., City.

"Dear Sir: We beg to acknowledge receipt of " your favor of the 1st inst. addressed to the sub- " scriber, and in reply thereto will say that you have " been misinformed regarding the lay days of the " Ship 'Columbia'. They are not as yet up, nor will " they be *for some days to come.* When the vessel is " discharged her demurrage will be treated in the " usual and customary way.

"We are, Dear Sir,

"Yours Faithfully,

" J. J. MOORE & Co.,

" J. J. MOORE, President."

On February 8th Mr. Hutton, the attorney, again wrote to respondent, saying that the lay days had expired on the 7th and that Captain Nelson desired the payment of demurrage then due (127). Respondent replied, saying, inter alia: "Under the most "favorable circumstances, in consideration of the "Charter Party, they (the lay days) will not expire "before the night of Thursday, the 13th inst., and "we further beg to advise you that the matter will "be handled as customary, when the time arrives" (128).

On March 16th, respondent finally gave a specific notice to have the vessel docked at the Folsom Street bunkers of the Western Fuel Company at 11 a. m. on March 17th (125), and she was finally discharged at 1 p. m. on March 20th (38).

The vessel was therefore detained in San Francisco for *67 days,* and, as we shall contend, *over 42 days* beyond her lay days. It will prove a vain task to search the law books for any case which holds a delay of this length justifiable, a fact of no mean importance.

The evidence further discloses a contract between the respondent and the Western Fuel Company, dated November 24th, 1906, for the shipment to San Francisco by respondent of between thirty and forty thousand tons of coal (129), and that the "Columbia" was almost the last vessel that discharged under it (Smith, 98). The contract protected respondent against any delay in receiving the coal by a pro-

vision that lay days should commence almost at once "after notice that vessel has entered at Custom House" (129). It also appears from the evidence that within four months prior to March 1st (Mainland, 61-62), the respondent alone brought over 45,000 tons of coal into San Francisco (Id. 65-66), all of which had been sold prior to its arrival (Id. 66).

It also appears from the evidence that in the latter part of 1907 and the early part of 1908, there was a coal congestion at the bunkers of the Western Fuel Company in San Francisco, and that the delay in the case of the "Columbia" was, according to the Superintendent of the said company, due to the congested conditions of its bunkers and storage places and the number of steamers arriving (Mills, 84). It was undisputed that there were often no vessels at the bunkers (Nelson, 44-45; Mills, 89-93); though Mr. Mills claimed that this was due to a congestion of the docks themselves (95). The question as to the custom of docking vessels in turn and as to whether the "Columbia" received her turn will be taken up on the argument.

The foregoing facts, stated with some fullness, put substantially the whole case before the court and the question to be decided is whether the respondent was justified under the charter party in holding the "Columbia" as a floating storehouse for its coal for the period in question.

The Lower Court's Decision.

The lower court accepted Mr. Moore's testimony as to his conversation with Captain Nelson, and held that this was a sufficient exercise of the option given by the charter to name a discharging berth, although the Western Fuel Company's bunkers included three piers, and that no more specific designation was requested. The court then held the law to be that the place so designated was to be regarded as if specifically named in the charter party as the place of delivery; and that hence the "Columbia's" voyage did not terminate till she reached said place and she was not until then ready or entitled to give notice of readiness to discharge her cargo.

Finally, the court held that the action of the respondent in designating a berth which the ship could not enter until March 20th, was neither arbitrary nor unreasonable, but within both the letter and the spirit of the charter. Under this decision, if affirmed, a consignee may order a vessel to the dock of a third party, which he knows will not be vacant for over 42 days after a vessel's lay days would ordinarily expire. We shall contend not only that the court has misinterpreted the law, but that under the settled law of *all* the cases, the action of the respondent was unjustified.

Specifications of Error and Contentions of Libelants.

It is unnecessary to here set out the assignment of errors in this case, which is quite lengthy and amply

covers any point which might be raised, as our contentions now to be made can be stated more briefly. We shall, in the first place, contend that, under the provisions of the charter party, the "Columbia" became an "arrived ship" upon giving her notice of readiness to discharge and that it was unnecessary that she should be in the berth designated by the consignee. Although this point is of importance and must be discussed at some length, it is by no means the crucial point in the case, for, even admitting that the law in this regard is as found by the lower court, we shall contend that the facts of the case at bar remove it from this principle. Without at present going more in detail into our contentions, they may be briefly summarized as follows:

(1). The "Columbia" became an "arrived ship" on reaching San Francisco and her lay days began to run as soon as she gave notice of her readiness to discharge.

(2). That even assuming the law to be otherwise, the designation of a berth by the consignee in this case, on January 15th, 1908, was wholly insufficient and there was in fact no designation at all till the subsequent date of March 16th.

(3). That again assuming that there was a sufficient designation of a berth on January 15th, said designation was not of a berth which the ship could occupy within a reasonable time and hence was ineffective and that it was further ineffective for the additional reason that the ship was prevented

from reaching the berth to which she was ordered at least in part by the acts of the charterer and consignee. In this connection we shall also discuss the "exception" clause of the charter party.

(4). That if either of the last two contentions be sustained it follows that the right of the consignee to order the ship to a specific berth was in effect waived and that the "Columbia" is to be treated as "an arrived ship" on January 15th, 1908.

(5). That there was no sufficient proof of any custom as to vessels taking their turn in unloading; that in any event, the "Columbia" did not receive her turn and that said custom is inapplicable under the charter party in this case.

(6). That the respondent was not released from its liability by the cesser clause of the charter party.

(7). That the lay days of the "Columbia" expired on February 6th, 1908, and that demurrage is due for 42½ days.

I.

THE "COLUMBIA" BECAME AN "ARRIVED SHIP" ON REACHING SAN FRANCISCO AND GIVING NOTICE OF HER READINESS TO DISCHARGE.

The charter party in this case provides for a voyage to a "port", namely, "to San Francisco harbor, Cal." (p. 21). Then follows the clause:

"To discharge at any safe wharf or place within " the Golden Gate and deliver the said full and com-

" plete cargo in the usual and customary manner, " at any safe wharf or place or into Craft alongside, " as directed by Consignees"(Id).

Later on is the following:

"To be discharged as customary, in such custo- " mary berth as consignees shall direct, ship being " always afloat, and at the average rate of not less " than 150 tons per weather working day (Sundays " and holidays excepted), to commence when the " ship is ready to discharge and notice thereof has " been given by the Captain in Writing" (pp. 22-23).

In other words, the voyage is a voyage *to San Francisco harbor,* but the consignee is given the option of selecting the exact berth for discharge after the vessel's arrival. It was entirely appropriate to place this option with the consignee and, even if it had not been expressly given, the law merchant would have implied it.

The Felix, (1868) 2 A. & E. 273;
Swan v. Wiley, 161 Fed. 905, 906.

The question is whether the existence of this option postpones the running of the vessel's lay days until she is in the berth designated by the consignee. The charter party was made in the United States and was to be performed there, so the English law does not govern the case. As, however, the decision of the lower court rests almost solely on two English cases, it will be well to notice the English law on the subject and we think it can be clearly established

that, if against our contentions, it rests on no logical basis and is a departure from earlier and sounder decisions. The recognized leading English case on the subject of an arrived ship is that of *Nelson v. Dahl,* 12 L. R. Ch. Div. 568; 4 Asp. Mar. Cases (N. S.) 172.

There the steamer "Euxine" was to proceed to "London, Surrey Commercial Docks, or so near "thereunto as she may safely get, and being always "afloat, deliver, etc." Now, as already pointed out, the consignee had an implied option to name the berth at which the vessel should discharge, which is a fact apparently overlooked in some of the later cases. The ship arrived in the Thames, but, owing to the crowded state of the port, was unable to secure a berth at the docks for several days. Nevertheless the consignee was held liable.

In the opinion of Brett L. J. it is said:

> "The right of the ship owner is that the liability of the charterer as to his part of the joint act of unloading should accrue as soon as the ship is in the place named as that at which the carrying voyage is at an end, and the ship is ready so far as she is concerned to unload. * * * If the named place describes, as before, a large space in several parts of which a ship can unload, as a port or dock, the ship owner's right to have the charterer's liability initiate commences as soon as the ship is arrived at the named place, * * * and is ready, *as far as the ship is concerned,* to discharge, though she is not in the particular part of the port or dock in which the particular cargo is to be discharged. But when the ship is at the

named place or 'the substituted place, and is ready to discharge, the liability of the charterer as to the unloading commences.'

"But if there be a stipulation, express or implied, on the part of the charterer that he will not detain the ship for the purpose of unloading beyond a specified time (and there is such a stipulation when lay days are allowed for unloading and demurrage days on payment of a daily sum), and if the ship be in fact detained beyond the lay days after she has arrived at the place named for the end of the carrying voyage, and is there ready so far as she is concerned to unload, the charterer must pay demurrage or damages in the nature of demurrage, though the delay in unloading has occurred from causes wholly beyond the charterer's control."

Cotton L. J. says:

"In my opinion, therefore, the ship, when moored in the river, ready to discharge her cargo, was entitled to say that she had arrived at the alternative place of discharge, and could require the defendant to accept delivery of the cargo. In this case, as from the time when the ship was ready to enter the dock, the case as between the ship owner and consignee must be dealt with *as if the ship had been in the dock,* and the delay, if any, must, in my opinion, be considered as that of the charterer, for which the owner is entitled to claim compensation in damages.

"The dock company having plenty of room in the dock, refused to allow the ship to enter; not for a time, nor for a day or a week, but until they and the charterer could arrange as to giving a discharging berth to the latter, and *when* they would be able or willing to do so, *they could not and would not say.* They would bind

themselves to nothing, and all they would say was, that it would be a month, or might be months, before they would in their good pleasure think fit to permit the ship to enter. It is not easy to see why they should not allow the ship to enter and lie afloat on their water space, waiting safely there to get up to a berth. Peradventure it was that the dock managers had a notion that the law was as is contended for by the defendant, namely, that so long as the ship remained outside there could be no demurrage, and that they were minded to favor the charterer at the expense of the ship owner by keeping the ship out. It was conceded in the argument that if the ship had been allowed or contrived to enter into any part of the dock, the voyage would have been at an end, although the ship had not got, and could not for a long time get to the discharging berth, or had been actually turned out. I find a difficulty in apprehending the distinction between failing to get up to the berth, between the ship being turned back at the lock gates and being turned out after she had got in without permission. *It does not seem to me reasonable that the rights and liabilities of the parties should depend on the caprice of a third party,* who, if that be so, might, apparently without violating any law, put a price on his exercise of such caprice. In my opinion, it is more reasonable to hold that the voyage, qua voyage, ends where the public highway ends, and that everything afterwards is part of the mutual and correlative obligations of the shipowner and merchant to do everything that is respectively incumbent on them in order to effectuate the discharge of the cargo, according to the true intent and meaning of the contract. The shipowner must of course, be willing and ready to go into the dock specified, just as he must be willing and ready to proceed when in

> the dock to a proper berth assigned to him for unloading. There is in my mind, a marked and broad distinction between the port of discharge, *the usual public place of discharge* in that port, which it is the shipowner's business at all events, and at his own risk to reach, and the private quay, or wharf or warehouse, or private dock, adjoining or near the port, on which or in which he is to co-operate with the merchant in the delivery of the cargo."

The main point in this case, as will be seen from the foregoing extracts, is that a ship becomes an arrived one as soon as she has reached the terminus of her voyage and is ready "so far as *she* is concerned" to unload. In this sense the "Columbia" in the case at bar was at all times ready to discharge her cargo, so far as she was concerned, (Larsen, 29) and every word in the above citations applies to the situation in which she found herself.

In the same year that *Nelson v. Dahl* was decided, a similar decision was given in the case of *Davies v. McVeigh,* 4 Asp. Mar. Cases (N. S.) 149. Bramwell L. J. there says in part:

> "Definitions are always dangerous and I am not anxious to state one which hereafter may be questioned; but it seems to me that it may be laid down that a vessel has reached her *place* of loading, as distinguished from the *spot* of loading, as soon as she has entered the *port* from which her outward voyage is to commence. I am not afraid of the consequences, even if this definition is pushed to a great extent."

That prior to this time the English law was as laid down in these cases is well established by the citations therein and the only case looking to a contrary view, *Tapscott v. Balfour,* 1 Asp. Mar. Cases (N. S.) 501, and which is relied on in the decisions cited by the lower court, is at least impliedly criticized in both cases.

In 1883 the case of *Murphy v. Coffin,* 12 Q. B. D. 87, so strongly relied on by the lower court, was decided. The case was disposed of, however, with great brevity and the decision was recognized as being inconsistent with that in *Davies v. McVeigh, supra.* It is to be noted that the delay involved in *Murphy v. Coffin* was only of 14½ hours.

In 1889 came the case of *Pyman Brothers v. Dreyfus Brothers,* 24 Q. B. D. 152, where the vessel was to proceed to "Odessa or so near thereunto as she may safely get" and there load. Odessa contained an outer and inner harbor. The vessel arrived in the outer harbor, at which she was as near as she might safely get to a loading berth, and the master gave notice of readiness. It was conceded by counsel *that the charterers had the right to order the ship to a loading berth,* but the court held that this right was subject to the lay day provisions of the charter and that the vessel, having reached a point where she was subject to the disposal of the charterers, was an arrived ship.

In the case of *The Carrisbrook,* 6 Asp. Mar. Cases (N. S.) 507, (1890), the charter contained an ex-

press provision for delivery of the cargo at one of several alternative places "as ordered by receiver". Yet the court unhesitatingly held the charterers liable for the ship's delay, saying that the case was governed by *Davies v. McVeigh,* and that *Murphy v. Coffin* was wrongly decided.

In 1891, the leading case relied on in the lower court of *Tharsis Co. v. Morel,* 2 Q. B. D. (1891) 647, was decided. The provision there was that the vessel was to deliver her cargo "at any safe berth as ordered on arrival in the dock of Garston", and the charterer was held not liable for delay in not naming a ready berth. To reach this result, however, it was necessary to overrule the case of *The Carrisbrook, supra,* and impliedly also the case of *Davies v. McVeigh,* and to reaffirm the judgment in *Murphy v. Coffin,* as well as to distinguish the case from *Nelson v. Dahl,* upon the ground that the use of the words "as ordered" prevented the carrying voyage from being over until the berth so designated was reached.

The case of *Monsen v. Macfarlane,* 8 Asp. Mar. Cases (N. S.) 93, very closely resembles the case at bar in several respects. The charter party there read that the ship should "proceed to a customary loading "place in the Royal Dock, Grimsby or as near "thereto as she may safely get, always afloat and "there receive a full and complete cargo of Kiver-"ton Park coal from such colliery as charterers or "their agents may direct * * * to be loaded

"as customary as per colliery guarantee in fifteen "working days."

The colliery guarantee, which the court held was incorporated in the charter party by the words, "as per colliery guarantee" read:

> "In fifteen colliery working days, (Sundays and colliery holidays not working days) after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo, (strikes of pitmen, frosts and storms, delays at spout caused by stormy weather or floods, and delay on the part of the railway company, either in supplying tracks or loading the coals from the colliery, or any other accident stopping the workings, loadings or shipping the cargo always excepted). * * * Time to count from the day following that on which *notice of readiness* is received, the said notice (in writing) to be handed to office during office hours * * * as soon as the ship is actually ready as above stipulated and not before. No notice received on Sundays or any colliery holidays. The ship to move to the spout and proceed with her loading whenever required to do so during the continuance of the lay days. Demurrage as per charter party, but not exceeding fourpence per registered ton per colliery working day. The non-fulfillment of any of the above conditions to render the guarantee null and void."

There was but one spout where this ship could load at Grimsby, and she gave notice of readiness on Sept. 3rd. Her turn did not come until Sept. 17th, and the colliery company did not give notice of readiness to deliver coal until Oct. 9th, the ship went under the spout Oct. 10th and was loaded Oct. 13th.

The judge of the lower court held that the lay days commenced to run from the day after Sept. 3rd when notice was given that the ship was *ready to load,* and gave judgment accordingly. The case was appealed. Lord Esher said in part:

> Page 94. "We must consider then, who are necessary parties to the transaction of loading. The shipowner and the shipper are of course. Loading a ship is a combined operation by shipper and shipowner. The division of the operation is that the ship owner must have the ship ready to receive the cargo, and that the shipper must have the cargo ready to put into the ship, and must bring it to the side of the ship and to the deck. * * *
>
> Page 95. " 'Time to count from the day following that on which notice of readiness is received'. The lay days, therefore, are to run *from the day following* that on which the shipowner *gives notice in writing that the ship is ready* to receive the entire cargo. * * * If the shipowner has given notice to the charterer and to the harbor master that he is ready to receive the cargo, but the colliery company cannot bring the coal to the spout, who is answerable for the delay? That is a part of the operation of loading which belongs to the charterer and he has to see that he gets the coal ready to load within the lay days. It is for this reason that the charterer takes care to get from the colliery owner a guarantee to deliver the coal within the lay days. * * * That being the state of things, when did the lay days first begin in the present case? It is ridiculous to suppose that the lay days begin when the vessel is under the spout. The insuperable difficulty in the way of that construction is that the harbor-master would not put the ship under the spout to re-

> main there for fifteen days, and there would never be any demurrage at all. * * * I think, therefore, that the clear meaning of the charter party, coupled with the colliery guarantee, is that notice may be given by the shipowner when the ship is ready to go under the spout to receive the cargo, and that the lay days begin to run on the day after that on which the notice of readiness is given to the charterer. The charterer is liable to the ship owner, and has his remedy over against the colliery owner under the guarantee."

This case is, in many respects, similar to the case at bar, even to the protection given the charterers, for, as already pointed out, the charterer in this case has a clear remedy over against the Western Fuel Company. The distinction drawn by the court in its decision from the case of *Tharsis Co. v. Morel* seems to us unsound, for if a ship is not "ready to discharge" until she reaches the berth to which she is ordered, it is hard to see how notice can be given before then. And this last point seems to have been in fact made in the case of *Sanders v. Jenkins,* 1897 1 Q. B. 93, where the words "Time for delivery to " count when the steamer is ready to discharge", were held not to entitle the ship to give notice till she was in her berth.

The foregoing cases show that there is considerable doubt as to the English law on this subject and this doubt is accentuated by the latest and most important decision of the Court of Appeal in the case of *Leonis S. S. Co. v. Rank,* 13 Com. Cases 136,

(1908, 1 K. B. 499), decided in 1907 and reversing the decision of the lower court. There the provision was "time for loading shall commence to count 12 " hours after written notice has been given by the " master * * * that vessel is in readiness to receive cargo".

The vessel arrived at the loading port, but it was crowded with vessels and the ship could not get a berth for nearly a month. Now, if the court had logically followed out the doctrine of *Tharsis Co. v. Morel, Murphy v. Coffin* and *Sanders v. Jenkins,* it would have held that the vessel was not "in readiness to receive cargo" until she had reached her berth, but no such conclusion was reached. The court recognized the rule, forgotten in the earlier cases, that the consignee had an *implied* option to name a berth, even where not expressly given such option, but said that this right must be a different one where it was given by the contract itself, for if it were not, then

> "The whole ground of the decision of *Tharsis Sulphur Co. v. Morel* and cases of that kind, is swept away, for their decision is rested upon the fact that the charter party does contain an express authority to name the berth."

We submit that this reasoning reduces the so-called "English rule" to an absurdity, for this distinction between a right implied by law and one given by the terms of the contract is fanciful to say the least. Yet upon this narrow margin rests the cor-

rectness of the decision in cases like *Tharsis Co. v. Morel.* The earlier case of *Pyman v. Dreyfus,* cited *supra,* is expressly approved in *Leonis v. Rank* and it is hard to reconcile this with the distinction made between it and the Tharsis case. We are strongly inclined to the belief that were the question now squarely put before the Court of Appeal, its judgment would be against the doctrine of the Tharsis case. It is recognized in *Leonis v. Rank* that the previous decisions are "not easy to reconcile". and Mr. Carver says that it seems "impossible to reconcile" them (Carver, 4 ed., Sec. 627), which should make the result in question more than likely.

Doubtless, counsel will cite passages from Scrutton's work on Charter Parties in support of points made by him in this connection, but it must be remembered that Mr. Scrutton is to be found as counsel for the charterers in most of the recent cases and his point of view seems to us a biased one. His conclusions are clearly in conflict with the decision in *Leonis v. Rank.* He in effect says that both *Davies v. McVeigh* and *Pyman v. Dreyfus* were wrongly decided (Scrutton 5 ed. pp. 100-101), yet both cases are approved in *Leonis v. Rank,* and when he speaks of the "dicta" of Bramwell L. J. in the former case as being "overruled" (Id.), we have only to call attention again to *Leonis v. Rank,* where Buckley L. J. says that said "dicta" constitute "a vivid and, I think, an accurate definition".

We have given this summary of the leading English cases, because the English law is made the basis of the lower court's decision. If, as we believe, the so-called law of England rests on no certain and secure basis, but rather, at best, on a fanciful distinction between a right given by contract and the same right given by law, then that law should not be adopted. All the equities in this case are with the shipowner and we do not believe justice will be subserved by adopting a rule founded on a clear misapprehension and resting on no good reason.

The American law on the subject of an "arrived ship" is by no means settled, but what little authority there is seems to make for the contentions of the libelants.

In *Carbon Slate Co. v. Ennis,* 114 Fed. 260, there was a provision in the charter "lay days not to com-" mence to count until 12 o'clock noon after the " steamer is entered at the custom house and in " every respect ready to load", and by a further clause the ship was required to load "when, where and as directed". According to the doctrine of *Tharsis Co. v. Morel,* the ship would not have been "ready to load" till she was at the berth to which she had been ordered. But the Circuit Court of Appeals for the Third Circuit took the more sensible view of *Nelson v. Dahl* that the "readiness" referred to was the readiness of the ship, "as far as she was concerned", saying:

> "When the steamer had been entered and was ready to load, and the stipulated notice had been

given, all had been done which she was required to do. It then became the duty of the shippers to promptly load her, subject only to the provisions by which they were allowed till 12 o'clock noon thereafter for the commencement of lay days. The ship's readiness to receive the cargo from the charterer's shippers was not dependent upon their readiness to assign her a berth. So long as this was not done, she was detained in waiting, not by any lack of readiness on her part, but by the unreadiness of the shippers, and therefore they, and not the master, were responsible for the consequent delay in loading her. It was not for him to obtain a berth, for the charter party expressly required him to load *when, where, and as directed.* Upon reaching the harbor the arrival of the ship was complete, and, while it was the duty of the master to then make the vessel ready to receive cargo, the designation of a place for its reception was, as we read the contract, as clearly incumbent upon the shippers as was preparedness to make delivery at some point within the port of Bilboa. *Gronstadt v. Witthof* (D. C.) 15 Fed. 265. If, as is contended, the delay in question was caused by a custom of the port that each vessel should await its turn to obtain a wharf, that fact could not relieve the charterers from their positive engagement as to the time at which the lay days would commence to count."

Language will also be found in the following cases tending to support the same theory:

Constantine etc. S. S. Co. v. Auchincloss, 161 Fed. 843;

Harding v. Cargo of 4908 Tons of Coal, 147 Fed. 971;

Smith v. Lee, 66 Fed. 344.

In *Gronstadt v. Witthof,* 15 Fed. 265, Judge Brown says:

> "The object of the shipowner is to limit and define as nearly as possible the time for which his ship is let as a whole to the charterer. The owner takes the risks of the time employed in navigation from port to port; but after arrival at the place designated for discharge, and the duties of navigation are over, he obviously intends to limit the period incident to unloading, and to be paid for any longer use of the vessel. It would be unreasonable and unjust, therefore, that the ship should bear the burden of delays caused after arrival, without her fault, in getting a berth at the dock, or at a landing designated by the charterer; and this applies also where a sole consignee is in the situation and has the powers of a charterer. *Philadelphia, etc. v. Northam,* 2 Ben. 1, 4; *Sprague v. West,* Abb. Adm. 548. It is reasonable and just that the charterer, or the consignee, who has the control of the ship, should take the risk of such delays as are more or less subject to his own directions."

We are fortunate in this case in being able to present to the court on this question a decision by the late Judge Hoffman, formerly judge of the court which decided the case at bar and to which, unfortunately, little consideration is given by the lower court. This is the case of *Williams v. Theobald,* 15 Fed. 465. The charter party in that case provided for a voyage "to San Francisco, or so near thereto as she can safely get", after which the cargo was to be delivered "alongside any craft, steamer, floating " depot, wharf or pier * * * as may be di-

" rected by the consignees to whom written notice is " to be given of the vessel being ready to discharge". The vessel was detained, as in the case at bar, because of the crowded condition of the port. His Honor reviewed the English cases up to the date of his decision and reached the conclusion that the charterer was liable for the delay. The case is certainly directly in point and if, as there said, the terminus of the voyage was San Francisco and not any particular dock, certainly that is equally true of the case at bar where the charter is equally explicit on the point. We shall go into this case more in detail under another heading of this brief.

Another case, which is strongly in point is that of *Percy v. Union Sulphur Co.,* 173 Fed. 534. The charter party provided that the lay days should commence "from the time the vessel is ready * * * " to receive cargo and notice thereof is given"; and also, "Vessel to take turn in loading * * * if " required". It was held that despite the provision as to taking her turn, the lay days commenced from the time the ship arrived and gave notice. This case is especially in point here for the reason that the consignee endorsed on the bill of lading the date on which the lay days commenced, which was held to be a practical construction of the charter, and, as such, entitled to great weight. And what else can be said of Mr. Moore's letters in the case at bar.

On February 3rd, he writes as to the lay days:

"They are not as yet up, nor will they be *for some days to come*" (125).

And on February 10th he again writes:

"Under the most favorable circumstances, in con-
" sideration of the Charter Party, they will not ex-
" pire before the night of Thursday, the 13th inst."
(128).

These letters, coupled with Mr. Moore's attempt to hire the "Columbia", cannot be consistently interpreted as in accordance with his present claim that the lay days did not commence till the vessel reached her berth. As said by Judge Hale in the case last cited:

> "A most salutary rule in this connection is stated in *Marriner et al. v. Luting,* Fed. Cas. No. 9,104, 'An agreement as to the proper interpretation of a contract bars each party from thereafter claiming a construction inconsistent therewith'.
>
> "The respondent, through its duly authorized agent, adopted a practical interpretation of the contract which is entitled to great, if not controlling, influence. *Topliff v. Topliff,* 122 U. S. 121."

We prefer to await the citation of any American cases which may be used against us, before replying thereto. Any expressions found on this subject in *Evans v. Blair,* 114 Fed. 616, and *Niver Coal Co. v. Cheronea S. S. Co.,* 142 Fed. 402, will be found to be pure dicta. The attempt of Judge Putnam in the latter case to sum up and rely on the English law on this subject shows the uncertain and fluctuating state of the English decisions, for he says:

> "Apparently, therefore, the law is as claimed by the W. K. Niver Coal Company, that the former customary words in charters, namely, ready to unload or discharge, and written notice given, have no effect except from the time the vessel reaches the precise berth where she is ordered by the consignee to discharge, subject, of course, to exceptions *where some special fault rests on him*".

Yet the subsequent decision of *Leonis v. Rank* by the Court of Appeal shows that this is not and never has been the English law and that a vessel is an "arrived ship" under the very conditions mentioned by the learned judge.

We submit (a) that it is by no means clear that the English law is against the libelants (b) that, even if it be conceded that it is, it rests on a fine distinction unworthy of adoption by our courts (c) that the American law is apparently with the libelants and that at least there are no decisions which would prevent this court from deciding in their favor.

This brings us to a brief discussion of the equity of the rule for which we contend. When a charter says that lay days are to commence "when the ship " is ready to discharge, and notice thereof has been " given by the Captain in Writing," a layman would at once assume that if the ship, as far as she was concerned, was ready, that would be sufficient. Any other conclusion would be a technical legal refinement and a distortion of plain language and the English Admiralty Courts have not been free from this

imputation. The shipowner is helpless in the matter and, drawn to its final analysis, the question would seem to be whether charterers can, for their own convenience and profit and without liability, convert a ship into a floating warehouse for an indeterminate time after the carrying voyage is ended. That is just what would be done if the decision of the lower court is affirmed. We submit that to give to the terms of the contract any such construction would clearly attribute a use foreign to the ship's creation and inhibitive of the purpose and object of libelants' ownership. Of course, such a contract *could* be made, but, if so, its express terms should *clearly* show it, and we submit that they do not do so in this case. The rule for which we contend gives the shipowner some measure of protection and the charterer is always able to protect himself. In this case there is no possible hardship on the charterer, for the purchaser of its coal has expressly contracted for the early commencement of the vessel's lay days (129) and, if the loss should eventually fall on the party who purchased the coal a year in advance of its delivery and who was to provide a place for its discharge, it would seem to fall where it rightly belongs. But the lower court's decision places the loss on the shipowners, who alone, of all parties to the transaction, had absolutely nothing to do with creating the situation which eventually confronted them.

We shall have more to say later on in this brief as to the equities of the case, but we submit that

under the law, as this court should find it, the "Columbia" was an "arrived ship" when she reached San Francisco and gave notice of her readiness to discharge and that any other doctrine would be subversive of justice. If this point be decided in favor of the libelants, that is an end of the case, but there are other contentions to be advanced which even more clearly demonstrate that libelants should recover.

II.

THE DESIGNATION OF A BERTH BY THE CHARTERERS IN THIS CASE ON JANUARY 15TH, 1908, WAS WHOLLY INSUFFICIENT AND THERE WAS IN FACT NO DESIGNATION AT ALL TILL THE SUBSEQUENT DATE OF MARCH 16TH.

As already pointed out, Mr. Moore testified in this case that, two days after the ship's arrival, he verbally informed Captain Nelson "that the cargo of " coal was sold to the Western Fuel Company, and " the ship would dock at their bunkers" (51). It will be also remembered that the cargo was to be discharged "in such customary berth as consignees *shall direct*".

To direct is "to order, to instruct, to point out a course of proceeding, to command".

Webster's Dictionary.

Mr. Moore's statement was hardly a "direction", but at most would seem to be merely the giving of information, reserving the right to later give a more

specific direction, as was done on March 16th. If Mr. Moore could have later ordered the "Columbia" to some other place, then his casual statement was no sufficient direction, and we find it hard to believe that he could not later have made a different order.

Again, it seems to us that the lower court was in error in holding "the bunkers of the Western Fuel Company" to have been a sufficient designation of a berth. These bunkers occupied several piers and how Captain Nelson was to tell from the alleged "direction" when and where he was to discharge is more than we are able to see. To say that a vessel is to go to one of three piers, without designating which, is, to say the least, rather indefinite. The lower court endeavors to support its decision in this respect by saying that "no more specific designation was requested". But this statement does not square with the facts, for, on January 18th and after the alleged conversation, a letter was written by Captain Nelson to the respondent, reiterating that the "Columbia" was ready to discharge and saying:

"Please procure and advise me of place of dis-
" charge" (124).

This letter must have at least given the respondent notice that Captain Nelson had not understood Mr. Moore's previous statement, and, considering its indefiniteness, it would certainly seem to have been incumbent on the respondent to have given the Captain more definite and formal instructions. Yet nothing was done in this regard till March 16th.

Nelson denies the alleged conversation with Mr. Moore and swears that he was told nothing as to the vessel's discharging place (37) and he is in a measure corroborated by the master of the "Columbia", who expressly asked at respondent's office where he was to discharge and was told that "they " did not know and furthermore they said that there " would not be anything done for three or four " weeks to come" (28). He is also corroborated by respondent's letters of February 3rd and 10th, as to the "Columbia's" lay days, which clearly implied that said days were running, and which were as clearly inconsistent with a previous "direction" as to where the "Columbia" was to discharge. We do not desire to claim that Mr. Moore may not have made the statement which he did, nor even that Captain Nelson did not believe that he was eventually to discharge at the bunkers of the Western Fuel Company, but we do claim that the evidence above cited clearly shows that the "Columbia" was not "directed" to proceed to any berth until March 16th and that none of the parties acted on the supposition that she had been.

We therefore submit that the option resting in the consignee to order the "Columbia" to a berth was not exercised seasonably and that the "Columbia" became in effect an "arrived ship" on January 15th.

See

Mowinckel v. Dewar, 173 Fed. 544.

Carlton S. S. Co. v. Castle, etc. Co., 8 Asp. Mar. Cases, 325, 326.

In the case last cited, the court says:

> "The charteres had no right to wait for a month before giving the order; they were bound to give it *almost immediately*".

III.

ASSUMING THAT THERE WAS A SUFFICIENT DESIGNATION OF A BERTH ON JANUARY 15TH, SAID DESIGNATION WAS NOT OF A BERTH WHICH THE SHIP COULD OCCUPY WITHIN A REASONABLE TIME AND HENCE WAS INEFFECTIVE. IT WAS FURTHER INEFFECTIVE FOR THE ADDITIONAL REASON THAT THE SHIP WAS PREVENTED FROM REACHING THE PLACE TO WHICH SHE WAS ORDERED BY THE ACTS OF THE CHARTERER AT LEAST IN PART. DELAY FROM CROWDED WHARVES DOES NOT EXCUSE THE CHARTERER UNDER THE EXCEPTIONS OF THE CONTRACT OR OTHERWISE.

Each of the foregoing subjects is in a measure distinct from the others, but they are so closely related and the authorities in regard to each have such a close bearing upon the others that they may advantageously be considered together.

The lower court seems to assume in this case that respondent's only duty was to "direct" the "Columbia" to a berth within a reasonable time, irrespective of the time when said berth should be vacant. We submit that such a rule would be highly inequitable, for a consignee could thus always secure himself against liability by simply giving an idle notice.

Ships have a large commercial value and are meant to ride the ocean and not to be put to the mean use of storehouses for coal. Yet the court's decision in effect permits the respondent to turn the "Columbia" into a floating warehouse until such good time as it shall suit its purchaser's business engagements to dock her. We submit that the consignee's duty is not discharged when he merely directs the ship to a berth, but that it goes further and requires him to select a berth which will be vacant within a reasonable time and we do not believe that there is any conflict in the authorities on this point.

Even in *Tharsis Co. v. Morel, supra,* the strongest case against libelants, Bowen L. J. says:

> "The most that can be said is, that the charterer does not exercise his option unless he names a berth that is either free or soon likely to be so."
>
> 7 Asp. Mar. Cases, at p. 108.

This language is quoted by the lower court in its decision, but its significance is apparently overlooked.

In *Carlton Steamship Co. v. Castle etc. Co.,* 8 Asp. Mar. Cases 325, 326, where a ship was to berth "as ordered", but was delayed by the tides, Lord Esher, after deciding that the charterers were entitled to order the vessel to a berth then occupied, says:

> "It seems to me that it would be sufficient if the charterers named a berth into which the ship could get within a reasonable time and there load her cargo always afloat."

Smith L. J. lays down a rule exactly similar on page 327 of the report.

And the same conclusion would seem to follow from *Evans v. Blair,* 114 Fed. 616, 619.

We cite these particular cases on this point for the reason that all are cited in support of respondent's contention that the "Columbia" was not an arrived ship and are hence exceptionally valuable as showing the limits of that rule.

In *1 Abbott's Merchant Ships and Seamen,* (14 ed.) p. 407, the author in recognizing the same distinction, says:

> "If the choice of the berth or dock is left to the merchant, he must probably select one which is reasonably ready."

And in the case of *Williams v. Theobald,* 15 Fed. at p. 472, the court says:

> "If such usage had been shown (i. e. a general custom for vessels to await their turn) and a particular dock had been mentioned in the charter party a reasonable detention while waiting a berth might be deemed within the contemplation of both parties, *but even then not any permanent or protracted detention.*"

See also

Manson v. N. Y. etc. Ry. Co., 31 Fed. 297, 298-299.

We shall defer a consideration of the question as to whether the time of the "Columbia's" delay was

reasonable until we have discussed the other contentions to be taken up under this heading, both of which have considerable bearing on the question.

PREVENTION OF PERFORMANCE BY RESPONDENT. EXCEPTIONS OF CHARTER PARTY.

The evidence tends to show in this case, as already pointed out, that the delay in discharging the "Columbia" was due to the congested conditions of the bunkers and storage places of the Western Fuel Company, and the number of steamers arriving (Mills, 84); there being, however, often no vessels at the bunkers (Nelson, 44-45; Mills, 89-93). This was due, according to defendant's amended answer, to a depression in manufacturing in the middle west and a lesser need for coal. Meanwhile, an unprecedented amount of coal was being brought in by coal dealers, including the respondent, from Australia. Certainly, no individual ship could be expected to take the risk of such conditions. Its owners could not tell what the coal dealers were doing nor how many vessels they had chartered for that was the private business of the charterers.

It is clearly in evidence that during five months prior to the arrival of the "Columbia", the respondent alone brought into the port of San Francisco *forty-five thousand seven hundred and fifty-six tons* of coal on various steamers, some of which had not been unloaded at the time of the trial, ten months

after its arrival (Mainland, 61-62, 65-66). It does not appear just where all these vessels unloaded, but at least one, the "Camphill", discharged at Mission No. 2 wharf, belonging to the Western Fuel Company, between February 6th and 13th, 1908 (Mills, 89). It further appears that the respondent had contracted with the Western Fuel Company to ship during the year 1907, *thirty to forty thousand tons* of coal at the rate of about one steamer load a month (Ex. H, p. 129), and that the "Columbia" was the last ship under this contract (Smith, 98).

Under these circumstances, we think it manifest that the respondent was at least in part directly responsible for the "Columbia's" delay. Mr. Moore said that he did not bring in *all* the coal that overloaded the port, but what difference does this make? It at least appears that only the "Camphill" with 5500 tons and the "Columbia" with 2220 tons applied on his contract with the Western Fuel Company, so we must assume that the remaining 22,280 tons, if he only furnished the minimum amount, was brought in prior to October, 1907, and we proved the furnishing of over 40,000 tons *to other parties* even after October.

Having done this, which is to bear the burden, respondent or the ship? It is plain that the conditions which caused the delay in unloading were brought about by respondent or at least partially so. It is idle to contend that because some of respondent's vessels did not unload at the docks of the Western

Fuel Company, it is not responsible. There was a general overloading of the port and if J. J. Moore & Company had not brought in coal for other people or sold to other people, the Western Fuel Company might well have found other places to discharge or sell their coal. Even as it was they had to hire store ships and even at the time of the trial there were 24,000 tons of coal so stored (Mills, 93). In this connection, the language of Judge Putnam in the *Niver Coal* case would seem to be in point:

> "The same course of reasoning is to be applied to all the steamers involved on the appeals before us. Each of them had her own rights as against the W. K. Niver Coal Company. They were not under a joint contract, but each was under a separate contract; so that each was entitled to assert her rights independently of the others, although the consignee had so involved itself by its several charters, or by charters on its account, that it was unable to do its duty by any one of them. A condition of affairs brought about by a contractor on the one part does not relieve him from his obligation to each of the contracting parties on the other part, acting severally, because the conditions resulted in embarrassing all of them at the same time. To consent to any other rule would permit a contractor to relieve himself from his contracts in proportion to the number of parties he might involve in his own embarrassment by virtue of his own separate voluntary acts."
>
> 142 Fed. at p. 412.

As a matter of plain fact, the respondent in this case made contracts and sales which materially as-

sisted in overstocking the coal market; the Western Fuel Company bought coal which overcrowded their bunkers, and now these two concerns seek to shift the burden of the situation to the only parties who were not responsible for the conditions, the owners of the "Columbia". And this on the ground that the cargo was to be delivered "as ordered", and respondents chose to sell the coal to parties who could not take delivery of it till *67 days* after the ship's arrival. If this is the law, it is bad law; but no reported case has ever held such a delay justifiable, save the case at bar.

The authorities on this subject of prevention of performance are closely connected with those dealing with causes which are held not to excuse the charterer. We therefore now refer to the "exceptions" in the present charter on which respondent relies, namely,

> "Any other hindrance of what nature soever, beyond the Charterers' or their agents' Control."

This and similar clauses have been repeatedly held not to apply to the excuse of overcrowded wharves and it has also been often held that, apart from this clause, overcrowded wharves offer no excuse.

Judge Hoffman in construing the clause: "except " in case of unavoidable accident or other hindrance " beyond charterer's control", says:

> "But this stipulation must, I think, be taken to apply merely to the rate at which the cargo

shall be discharged when the discharge has been commenced. The present suit is for damages in the nature of demurrage for failure to designate a wharf where the discharge could be commenced. By the terms of the charter party, the cargo, on arrival of the vessel at San Francisco, is to be delivered 'along-side any craft, steamer, floating depot, wharf, or pier, * * * as may be directed by the consignees, to whom written notice is to be given of the vessel being ready to discharge;' and the only question in this case is whether the consignees, for their own convenience and profit, had a right to designate a wharf at which they well knew the discharge could not be commenced until after a considerable detention of the vessel."

Williams v. Theobald, 15 Fed. 469.

It is well settled in this country that a clause creating liability for detention caused "by default of the charterer" makes him responsible for delay arising from the crowded state of the port. This rule was first laid down in *Davis v. Wallace,* Fed. Case 3657 and has been repeatedly followed.

See

New Ruperra S. S. Co. v. 2000 Tons of Coal, 124 Fed. 937 (1905) and cases there cited.

In *Thacher v. Boston Gas Light Company,* Fed. Case 13,850 (cited with approval in *1600 Tons of Nitrate of Soda v. McLeod,* 61 Fed. 849, 852), the charter party read:

"For each and every day's detention by default of said party of the second part or agent, $50 per day, etc."

The court in that case, after reviewing certain other decisions on the same point, says:

> "These three decisions are not inconsistent with each other, and they mean that the proviso intends to exonerate the charterer from delay occasioned by superior force acting *directly* upon the discharge of that cargo, and not from the indirect action of such force, which by its operation on other vessels has caused a crowded state of the docks."

The Circuit Court of Appeals for this circuit, in *1600 Tons of Nitrate of Soda v. McLeod (supra),* says:

> "The charter party which makes the charterer liable for demurrage only when caused by his default, does not relieve him of liability for delay caused by his omission to perform his covenants, even though he is not guilty of negligence."

And in that case the language quoted above from *Tacher v. Boston Gaslight Co.* as to the excuse of crowded docks is expressly quoted with approval. To the same effect are:

Phil. R. R. Co. v. Northam, Fed. Case 11,090;
Futterer v. Abenheim, Fed. Case 5,164;
Dow v. Hare, Fed. Case 4,037a;
Gronstadt v. Witthof, 15 Fed. 265;
Mott v. Frost, 47 Fed. 82;
Carbon Slate Co. v. Ennis, 114 Fed. 260.

It is apparent from these cases that where a charter party requires that a vessel be unloaded within a certain time or at a certain rate, that provision is

absolutely binding upon the consignee unless he is excused by some express exception acting directly on the discharge, and that a failure to comply with it is clearly caused "by the default" of the charterer or consignee, even though he may not be directly to blame.

In the case at bar the expression used is not "de- " tention caused by default of the charterers", but " any other hindrance of what nature soever beyond " the Charterers' * * * Control".

But in *New Ruperra Steamship Company v. 2000 Tons of Coal,* 124 Fed. 937, 938 (affirmed in 142 Fed. 402, 412-413), it is said:

> "Liability for delay happening by the charterer's default is not more extensive than for delay not arising from causes or accidents beyond the charterer's control."

And in that case, where the clause in question was similar to that in the case at bar, the court followed the doctrine of *Davis v. Wallace* and the other cases we have cited, and held that a delay caused by a crowded state of the port was not to be considered as excused by the exception in the charter party reading "or any other causes or accidents beyond the " control of the consignees". The case is also an extremely valuable one as holding that such a clause includes only causes ejusdem generis with those previously mentioned.

Many of these cases not only appear to make for the proposition that the "exception" here in ques-

tion does not apply, but to intimate that a charterer is to be considered as preventing performance if he brings a vessel to an over-crowded port. This is especially true of the citation from *Williams v. Theobald, supra.* It is also brought out by the concurring opinion of Judge Aldrich in the *Niver Coal case,* where he says:

> "Moreover at the time in question, the consignees had several heavy-draft, coal-laden vessels in the harbor, and two or more in the immediate field of the congestion which was causing the delay. As a consequence the consignees were actively contributing, in a measureable degree, to the creation of a situation which they set up as a ground which should relieve them from their demurrage stipulation. Being thus in the rush which created the congestion, they are not in a position to set it up in their own behalf as a cause relieving them from demurrage under the exemption clause to which I have referred."
>
> 142 Fed. at p. 415.

Carver in his work on *Carriage by Sea,* 4 ed., Sec. 623, after laying down various rules as to when a vessel is an "arrived ship", says:

> "If *in any case* the ship is prevented from going to the wharf, dock or other agreed place for loading or discharging by obstacles caused by the freighter, *or in consequence of other engagements which he may have entered into,* then the lay days will begin as soon as the ship is ready, and could, but for such obstacles, go to that place to load or discharge."

In *Aktieselskabet Inglewood v. Miller's Karri, etc.,* 9 Asp. M. C. (N. S.) 411, 412, the court says:

"The second circumstance relied upon by the plaintiffs is a different one. If a ship is prevented from going to the loading place, which the charterer has the right to name, by obstacles caused by the charterer, or in consequence of the engagements of the charterer, the lay days commence to count as soon as the ship is ready to load, and would, but for such obstacles or engagements, begin to load at that place. This is in substance the proposition deduced, and, in my opinion, rightly deduced, from the cases by Mr. Carver in his work on *Carriage by Sea,* 3rd Edit., s. 627. The law is stated by Barnes, J., in *Ogmore Steamship Company v. Borner and Co.* (6 Com. Cas. 110): 'It appears to follow that if the charterers have other vessels which they have to discharge, and have arranged to discharge, in the dock before the vessel which by the charter is to proceed to the dock, and by the practice of the port will not be admitted into the dock while the charterers have the other vessels in the way, the charterers do prevent the shipowners from performing their contract until the charterers have cleared away the impediments.' In *Watson v. Borner and Co.* (5 Com. Cas. 377), the particular facts were held not to justify the application of the principle, but at p. 379 the existence of the principle is stated by Lord Halsbury L. C.: 'No doubt if the charterers had presented any impediment preventing performance of the shipowners' obligation different considerations might have arisen.' "

In Mechem's well-known work on *Sales,* Vol. II. Sec. 1106, the learned author says:

"PREVENTION BY ONE PARTY EQUIVALENT TO PERFORMANCE BY THE OTHER.—Akin to the question of waiver of performance is that of the prevention by one party of performance by the

other. If the performance by one party is a condition precedent to performance by the other, and the latter, when the former offers or is ready to perform, refuses to accept the performance, or hinders or prevents it, this is clearly a waiver and the latter's liability becomes fixed and absolute. This act of prevention may be either an express refusal to accept or permit performance, or it may be some act in pais operating more indirectly to prevent or preclude performance. In either event, however, the act or conduct of the one which prevents performance by the other is an excuse for the latter's non-performance. 'If it were necessary to cite any case for this, which is evident from common sense,' said Ashhurst, J., 'it was so held in Roll's Abridgment and many other books.' "

In the recent case of *Schwaner v. Kerr,* 170 Fed. 92 (just affirmed by this court), the court says at page 96:

"Now, if it be conceded that any hindrance, in its broadest sense beyond the control of the charterers, is within the intendment of the charter party to prevent the running of lay days, it does not appear that the delay in the car service was the proximate cause of the ship not having its requisite cargo in due time. It cannot be that a cause of delay, springing from another cause, which rose by reason of the charterers' own acts, will suffice to postpone the lay days. Such a cause of delay could not be said to be beyond the charterers' control, for they might have chartered fewer vessels, and thus lessened the demand for cargo, so that the cargo that was delivered would have fully met the demand for shipping abroad. The charterers surely could not complain if

> they had brought into the harbor of Portland twice the amount of shipping that they could supply cargo for from the interior, under the usual course of delivery by the railroad, for they themselves would be to blame for the condition. They ought to have foreseen the result."

This language is also strongly in point as regards the "exceptions" in the charter party.

It seems unnecessary to cite further authorities on this question of prevention of performance, for it would, as said by Mechem, seem to need no authority.

No charter party, we venture to say, contemplates that the charterer can, by a series of engagements with which the shipowner has nothing to do, tie up a vessel for an indefinite length of time. He can, perhaps, under the decision in *Tharsis v. Morel,* order a vessel to the berth of a third party which may be occupied for a short time before the ship can get there, but even that decision expressly states that the ship must be berthed within a reasonable time, and it does not and cannot sanction a delay caused by the charterer's own prior engagements.

The cases of *Larsen v. Sylvester,* 11 Asp. Mar. Cases (N. S.), advance sheets, p. 78, and *Pyman S. S. Co. v. Mexican Central Ry. Co.,* 169 Fed. 281, will doubtless be relied on in support of the proposition that the words in the present charter, "any " other hindrance of what nature soever beyond the " charterers' or their agents' control", absolve the

respondent from liability in the case at bar. We will state frankly that we believe those cases to have been wrongly decided and to be inconsistent with the doctrine of *Davis v. Wallace, supra,* expressly approved in *Crossman v. Burrill,* 179 U. S. 100, 112, 113, and the other cases cited by us upon this point. The court should notice especially the rule laid down in *New Ruperra S. S. Co. v. 2000 Tons of Coal,* 124 Fed. 937, 938, 939, where the "exception" was practically the same as in the case at bar and the excuses as to the overcrowded wharves and the vessel awaiting her turn were exactly the same. It is true that the lay day clause was different in that case, but the rule in regard to the "exceptions" would, of course, be the same, and that is all we are dealing with at present. It should be noted also that on the appeal in that case, the ruling of the lower court on this point was upheld *(W. K. Niver Coal Co. v. Cheronea S. S. Co.,* 142 Fed. 403). The appellate court clearly intimates that such a clause of "exception" cannot be allowed to nullify the lay day clause, whatever that may provide (Id. pp. 412-413). Certiorari was refused by the Supreme Court (202 U. S. 647). It seems to us that this case, where the authorities are exhaustively gone into, is to be preferred to the brief opinion in *Pyman v. Mex. Cent. Ry. Co.,* where no authorities at all are cited and where the case was apparently presented in a summary fashion. As for the case of *Larsen v. Sylvester,* it seems to us clearly unsound and to be contrary to the case

of *The Arbitration,* 1 Q. B. 261 (1898), and other cases cited by Mr. Scrutton in his work on charter parties (5 ed. p. 183, note g), holding that the clause "other causes beyond the charterers' control", does not cover a case of overcrowded wharves. *Larsen v. Sylvester* may be now law in England, but to establish its doctrine here would be contrary to a long line of American cases, starting with *Davis v. Wallace.*

We think, however, that both of the cases in question may be readily distinguished from the case at bar. In *Pyman v. Mex. Cent. Ry.* the places where the coal could be loaded were very few and all were under the control of two railroad companies, whereas in the case at bar there were numerous other places where nothing but coal was discharged, both in San Francisco and Oakland (Nelson, 43-44), which were not shown to be occupied, and numerous empty docks where Captain Nelson had often seen coal discharged (Id. 41-42). And in *Larsen v. Sylvester* there was apparently only one dock, with six tips, which was entirely controlled by one firm, the Great Central Railway Company (11 Asp. Mar. Cases (N. S.) 78). These instances come far from establishing that because one particular concern (the Western Fuel Co. in this case) cannot give a vessel space at its bunkers for *63 days* after her arrival and because the charterer has chosen to sell his coal to that particular concern, he is to be excused on the ground of a

"hindrance * * * beyond the charterers' con-
"trol". Such a holding would, as we have said, nullify *any* provision as to lay days and would make the ship owner subject to the caprice of any third party whom the charterer might select. In any event, the "exception" clause is obviously inapplicable if there was any prevention of performance by the charterer, and we submit that, under the cases cited by us, it is inapplicable under any theory of this case.

We shall not prolong the argument under the present heading by a discussion as to whether the time during which the "Columbia" was detained was *reasonable.*

The maxim, *res ipsa loquitur,* is here applicable to its fullest extent. To say that a valuable vessel may, under any law, be detained for *67 days* after her arrival and for *42 days* after her lay days would ordinarily have expired, is, in our opinion and with all deference to the lower court's decision, almost an absurdity. Shipping could not go on under such conditions, and we have been unable to find any reported case countenancing such a delay. It is significant in this connection that the "Columbia" was actually discharged in four days. This would seem to clearly show that the time of about *15 days* allowed by the charter party, in which to discharge, was an ample one, allowing for all *reasonable* obstacles, and should itself afford very potent evidence of what a "reasonable time" of detention actually would be.

The circumstances of this case have already been described and we do not believe that, under those circumstances, this court will hold the delay in question to have been a reasonable one.

IV.

IF EITHER OF THE LAST TWO CONTENTIONS (II AND III) BE SUSTAINED, IT FOLLOWS THAT RESPONDENT'S RIGHT TO ORDER THE "COLUMBIA" TO A SPECIFIC BERTH WAS IN EFFECT WAIVED AND THAT SHE IS TO BE TREATED AS AN "ARRIVED SHIP" ON JANUARY 15TH, 1908.

If, as contended under heading II. of this brief, there was no sufficient designation of a place of discharge till March 16th, the conclusion above stated would seem to follow from the case of *Mowinckel v. Dewar,* 173 Fed. 544. That case unquestionably establishes that such a delay in *naming* the place of discharge would be unreasonable. The effect of such a delay, as a matter of law, is there stated as follows, on page 549 of the opinion:

> "The evidence tends to show that if the vessel had, upon her arrival, been ordered to the bunkers of the Western Fuel Company, she could not have discharged her cargo at an earlier date than she, in fact, did, because of the occupancy of those bunkers by vessels arriving in port prior to the Rygja; but I do not think this is material in determining the question whether the consignee's option to name the place of discharge was exercised in a reasonable time. The bunkers of the Western Fuel Company were not the only places where the vessel

could have been required by the consignee to deliver her cargo, and if it could delay naming one of these bunkers as the place of discharge from the 4th to the 10th or 26th of February, and still retain the option given by the charter, it would have had the right at the latter date to direct the vessel to proceed to one of the many other places referred to in the charter and discharge, if for any reason it had then been the interest of the consignee to so order. The contract does not contemplate that the vessel shall be delayed for so long a time, after her arrival in port, before receiving notice of the place where she is to discharge her cargo.

"The failure of the consignee in this case to exercise its option to order the vessel to a place of discharge within a reasonable time was a waiver of the right, and as the vessel was in one of the alternative places at which she might, by the terms of the charter, have been required to deliver her cargo, her master had the right to say that her carrying voyage was then ended, and to give notice of her readiness to discharge. This conclusion necessarily follows from the elementary rule of law that, where a contract provides alternative modes of performance, and gives the right of election to one party, upon the failure of such party to make his election at the proper time, the right to elect the mode of performance passes to the other party."

As this reasoning appears to us to be clearly sound, we do not care to further prolong the argument on the point. The appeal in that case is set for argument on the same day as this and the question will be then presented to this court for decision in more detail than is necessary in the case at bar.

We are also informed that the court's rulings in that case as to when the lay days began to run will also be taken up in detail. The court there decides that they began only "after a reasonable time", arbitrarily fixed by the court, had *expired.* We submit, however, that the waiver should clearly relate back to the time of giving the first notice (Carver's Carriage by Sea, Sec. 623), and as that question is to be fully discussed in that case, we see no necessity for doing more than stating our contention in regard to it here.

The same reasoning follows if, as contended under heading III. of this brief, the charterer is responsible for the delay of a vessel if he (a) names a berth which she cannot reach within a reasonable time or (b) by his own previous engagements prevents her reaching such berth. If a failure to *designate* a berth within a reasonable time is a waiver of that right, so also, it seems to us, the right is waived if he makes an unreasonable designation or prevents performance. And as said in Carver on *Carriage by Sea,* Sec. 623:

> "If in any case the ship is prevented from going to the wharf, dock or other named place for loading or discharging by obstacles caused by the freighter, or in consequence of other engagements which he may have entered into, *then the lay days will begin as soon as the ship is ready* * * *".

The same rule would seem clearly applicable to the case where a berth is designated to which a

ship cannot go within a reasonable time, and also to a case where there is no sufficient designation of any berth. We also refer again to the case of *Aktieselskabet Inglewood v. Miller's Karri, etc., supra,* as expressly approving and following this principle laid down by Mr. Carver.

V.

THE "CUSTOM OF THE PORT" AS TO VESSELS TAKING THEIR TURN IN UNLOADING IS INAPPLICABLE; IT WAS NOT SUFFICIENTLY PROVED AND, IN ANY EVENT, THE "COLUMBIA" DID NOT RECEIVE HER TURN. HEREIN ALSO OF THE WORDS "AS CUSTOMARY" IN THE CHARTER PARTY.

If, as we have before contended, the words in the charter party that the discharge is to be "at the "rate of not less than 150 tons per weather work- "ing day * * * to commence when the ship "is ready to discharge and notice thereof is given "by the Captain in Writing", mean what they would convey to a person of reasonable intelligence, namely, that the ship is to be discharged at certain rate after notification that the ship is ready and where she *is* ready, as far as *she* is concerned, then no custom can change this express agreement.

J. J. Moore & Co. v. U. S., 196 U. S. 157.

In *Davis v. Wallace,* Fed. Case No. 3657, which has before been cited and is applicable to many aspects of this case, the court says at p. 185:

> "Where there is no special contract, the usage of the port in respect to the reception

> and delivery of the cargo, in controversies between the shipowner and the consignee, is frequently a very material consideration; but demurrage is a matter of contract, and it is well-settled law that usage cannot prevail over or nullify the express provisions of a contract * * *. Stipulations, express or implied, that the ship shall not be detained beyond the period or periods specified in the contract of affreightment are not controlled by the usage of the port where the vessel is to load or discharge; and if the freighter detains the vessel beyond the time specified, he is liable to an action on the contract adapted to the nature of the instrument and the practice of the jurisdiction where the suit is brought."

In that case the coal was sold just as it was in this and the same claim was made, to-wit: the overcrowding of the wharves of the person to whom the coal was sold. Of course, we admit that the language of the charter was different from that of the case at bar, but the point we now wish to make is merely that *if* a time for discharging is fixed by the charter, no custom can change it, which proposition that case establishes.

And in *Williams v. Theobald, supra,* where the charter was almost exactly similar to that in the case at bar and where the same time-worn excuses of overcrowded wharves and a "custom of the port" were presented, Judge Hoffman says:

> "But in this charter not only is no particular dock mentioned, but the vessel is required to discharge 'alongside any craft, steamer, floating depot, wharf, or pier, as may be directed by the consignees'. It may, perhaps, be doubted

> whether it was contemplated by either of the parties that a dock might be selected by the consignees into which, by the usage of the port (if such usage had been shown), vessels could only enter in their turn. If a usage had in fact existed requiring Australian coal vessels to discharge in their turn at particular wharves, the parties do not seem to have contracted with reference to it, for the charterer reserved the right to designate 'any craft, steamer, floating depot, wharf, or pier' he might select."
>
> 15 Fed. at p. 472.

It may be contended that the words in the charter party that the cargo is to be delivered "in the usual and customary manner" (21) and that the vessel is to be "discharged as customary" (22) alter the situation as above outlined, but it is abundantly settled by authority that such words in charters relate to the *mode* of discharge after the vessel has reached her berth and have no relation to the question of the time *when* she is to reach her berth for discharging purposes.

Thus in *Nelson v. Dahl, supra,* it is said of a statement by Bovill, C. J., that a provision to load " in the usual and customary manner" referred to the mode of delivery and not to the time of delivery: " And surely he was right" (4 Asp. Mar. Cases N. S. at p. 176).

In *Davis v. Wallace, supra,* it is said:

> "Reference is made by the respondents to the stipulation in the charter party that the cargo shall be received and delivered at the ports of loading and discharging *as customary.* But it

> is evident that that clause refers to the *manner of* receiving and delivering the cargo, and that it has nothing to do with the question under consideration." (i. e. to the *time* of discharging.)
>
> Fed. Case No. 3,657, at p. 185.

In *Carbon Slate Co. v. Ennis, supra,* the court says:

> "Nor is the clause directly under consideration at all qualified by the distinct provision that the ship was to load, 'in the usual and customary manner'. These words do not apply to the time to be taken in loading, but only to the manner of loading."
>
> 114 Fed. at p. 262.

See also

J. J. Moore & Co. v. U. S., 196 U. S. 157.

Numerous other cases, English and American, might be cited to the same effect, but the foregoing seem sufficient. Any provisions as to "custom" in this charter party, therefore, must be taken to relate to the *method* of discharging the coal *after* the ship is berthed and they have no relation to this case.

Coming now to the proof of the alleged custom in this case, it is to be noted that it concerns only a single individual firm, the Western Fuel Company, a corporation with which the libelants have no connection or privity whatever. Even had the charter party contained an *express provision* that the "Columbia" should discharge "in turn", the pro-

vision would only apply to the general and established usage of the port and *not to the custom of a private individual.*

9 *Encyc. Law,* 241-242.

Much more is this so when nothing is said about any custom in the contract. We are at a loss to know what the libelants had to do with the Western Fuel Company or its practice. Libelants' contract was with the respondent and they are not bound by the practices of a person with whom they never contracted.

See in this connection *Neilson v. Jessup,* 30 Fed. 138, 139.

Moreover, the testimony of Mr. Smith and Mr. Mills as to the alleged custom is vague and unsatisfactory. They simply stated their practice to discharge vessels in their turn and steamers before sailing vessels, but it does not appear that there had been any previous congestion before the time in question, so that vessels could not be discharged within their lay days and, if not, there would have been no occasion for any custom arising. Furthermore, as was said in *Williams v. Theobald, supra:*

> "If a usage had in fact existed requiring Australian coal vessels to discharge in their turn at particular wharves, the parties do not seem to have contracted with reference to it, for the charterer reserved the right to designate 'any craft, steamer, floating depot, wharf, or pier' he might select."
>
> 15 Fed. at p. 472.

Practically the same option is given in this case (21) and the same reasoning is applicable.

Again, the evidence seems clear in this case that the "Columbia" did not receive her turn. The "J. H. Lunsman", another sailing vessel, also chartered to respondent, and carrying a cargo of coal from the same port as the "Columbia", arrived in San Francisco on January 21st, and was unloaded in part at the bunkers of the Western Fuel Company on February 22nd, and finished her discharging at Oakland on March 4th (Mainland, 62). Counsel claimed that only a part of her cargo was discharged in San Francisco and it was on a holiday. But this can make no difference. A custom must certainly be general to be effective.

The evidence establishes that there are at least six places in San Francisco where coal is discharged and three in Oakland (Nelson, 43-44), where the "Columbia" might also have been discharged under the charter party. There were lots of empty docks in the harbor, and Captain Nelson said he had often seen coal discharged at these (Id. 41). There were often no ships at even the Western Fuel Company's three bunkers (Nelson, 44-45; Mills, 89-93), though Mr. Mills claimed that this was because the docks were congested by coal, which they could not put elsewhere (Mills, 95). In view of these circumstances, how can it be fairly claimed that the "Columbia" could be held for 67 days because of a " custom" of a particular individual to whom re-

spondent had sold its coal? It would be inequitable in the extreme to sanction any such doctrine.

We have already said too much as to this question of custom, but we cannot forbear citing a passage from an article in the British Magazine "Fair Play", in the issue of December 12th, 1907. In this the writer comments approvingly on the advance made in the English law by the case of *Leonis v. Rank, supra.* The part of the article which we wish to cite is as follows:

> "Owners should always try to get the condition that time is to count twelve hours after arrival at the loading port, but even where they fix their vessels on that basis, charterers now and then, when demurrage arises, object to allowing time to count from twelve hours after arrival, pleading 'the custom of the port' or some other plausible reason why the lay days' period should not become countable until twelve hours after the vessel is located, ready, at the loading berth. This is an entirely unjustifiable attitude. But in numerous instances owners have given way to it; partly because they fear there may be "something" in the pleas, more especially in the "custom" plea; partly because they desire to avoid litigation at almost any cost; and partly because they wish to keep on amicable terms with charterers. I will venture to say that they have lost thousands, many thousands, of pounds by submitting to the pretensions of their charterers."

VI.

THE CESSER CLAUSE OF THE CHARTER PARTY DOES NOT RELIEVE RESPONDENT IN THIS CASE.

This point was not relied on in the lower court by the respondent and we merely refer to it to prevent any misapprehension on the part of the court. The cesser clause is only meant to relieve the charterer *qua* charterer. The receipt of the bill of lading, however, gives him a new character, as *consignee,* and, as such, he is clearly liable for demurrage incurred under the terms of the charter, where such terms are incorporated by reference as in this case (11; 100).

Carver Carriage by Sea, Secs. 607, 637;
Gullichsen v. Stewart, 13 Q. B. D. 317;
Crossman v. Burrell, 179 U. S. 100.

VII.

THE LAY DAYS OF THE "COLUMBIA" EXPIRED ON FEBRUARY 6TH, 1908 AND DEMURRAGE IS DUE FOR FORTY-TWO AND A HALF DAYS.

The "Columbia" carried 2220 tons of coal and at the rate of 150 tons a day provided by the charter, she should have been discharged in 14 days 6 and ⅓ hours.

The following list shows the working days, as shown by the evidence of Captain Nelson (Nelson, 69-72), which is unquestionably to be preferred to that of Mr. Mainland. (See Mainland, 68-69.)

		Days.
January 15th, Notice given at 12 Noon,	Clear day	½
" 16th	"	1
" 17th	"	1
" 18th	Rain	
" 19th	Sunday	
" 20th	Rain from 2 p. m.	6 hrs.
" 21st	Clear	1
" 22nd	"	1
" 23rd	Rain up to noon	½
" 24th	Clear	1
" 25th	Worked in afternoon	½
" 26th	Sunday	
" 27th	Clear	1
" 28th	"	1
" 29th	Worked in forenoon	½
" 30th	Clear	1
" 31st	"	1
February 1st	Rain all day	
" 2nd	Sunday	
" 3rd	Clear	1
" 4th	Worked in afternoon	½
" 5th	Clear	1
" 6th	"	1

According to this list, the lay days expired at 4 p. m. on February 6th, and, as the vessel was finally unloaded at 1 p. m. on March 20th, the period of her detention over the lay days would be a fraction over 42½ days. The charter party provides for demurrage at 3d. per register ton per day after the lay days (22). Thus the demurrage per day would be 6 cents times 1,327, or $79.62 per day, and $3,383.85 for the whole period. We submit, for the reasons advanced in this brief, that libelants are entitled to a decree for this sum with interest, and that the decree of the lower court dismissing the libel should be reversed.

Dated, San Francisco,
February 25th, 1910.

H. W. Hutton,
E. B. McClanahan,
S. H. Derby,
Proctors for Appellants.

No. 1808

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

IN ADMIRALTY.

ANDREW ANDERSON, A. ANDERSON COMPANY (a corporation), JOHN J. BEATON, ANGUS BEATON, EDWARD CARLSEN, HARRY F. CHASE, MALCOLM P. CHASE, L. CHASE, SAMUEL B. CHASE, MARY L. CHASE, WM. B. CHASE, JR., DOROTHY M. CHASE, FRED J. CHASE, GEORGE BOOLE (a corporation), MRS. E. G. BOOLE, HENRIETTA W. HOBBS, E. W. HOBBS, CLARENCE W. HOBBS, EDWARD HENRIX, MARGARET J. WALL, MARION B. WALDRON and HENRY NELSON, Libelants,

Appellants,

vs.

J. J. MOORE & COMPANY (a corporation), Respondent,

Appellee.

BRIEF FOR APPELLEE.

WILLIAM DENMAN,
Proctor for Appellee.

Filed this.....day of March, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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J. J. MOORE & COMPANY (a corporation), Respondent,

Appellee.

BRIEF FOR APPELLEE.

Statement of Facts.

The extraordinary congestion of shipping in the port of San Francisco, in the months of January, February and March of the year 1908, has brought before the courts in not less than five cases, the centuries old dispute between shipper and vessel owner, as to the responsibility for delay in reaching the place at which the ship owner is to make his delivery.

San Francisco's reputation for such congestions has not been bad, but evidently both parties had such a contingency in mind, as the contract expressly provides that the charterer shall not be liable for "hindrances beyond his control." It is not less significant that we find in the charter party at bar none of those short phrases upon which ship owners customarily rely to place the burden of procuring a ready berth on the consignee.

The constant repetition of such phrases in the maritime decisions shows their use is well established in the shipping world. No question could have been raised as to the absolute responsibility of the charterer either to find a berth or become liable for demurrage if the owner had inserted in his charter party a phrase to the effect that the lay days commence "24 hours after her entry at the custom house" *(Carbon Slate Company v. Ennis,* 114 Fed. 260; *Demster Steamship Line v. Earn Line S. S. Co.,* 168 Fed. 50); or that the

"vessel shall be loaded promptly" *(Harding v. 4908 Tons of Coal,* 147 Fed. 971); or that the lay days shall begin "24 hours after arrival in port" *(Smith v. Lee,* 66 Fed. 344); or, lay days "to commence 24 hours "after her inward cargo or her unnecessary ballast is "finally discharged" *(1600 tons of Nitrate v. McLeod,* 61 Fed. 849 at 851); or, that she shall have "quick dispatch" *(Davis v. Wallace,* 3 Clifford 123; *Mott v. Frost,* 47 Fed. 82); or "customary dispatch" *(Lindsay, Gracie & Co. v. Cusimano,* 12 Fed. 503); or, that the lay days shall begin when "the ship is ready, whether in berth or not" *(W. K. Niver Coal Co. v. Cheronea S. S. Co.,* 142 Fed. 402); or, that they shall begin when the vessel reaches a certain "dock or as "near thereto as she can safely get" *(Nelson v. Dahl,* 12 Chancery Div. 562).

The appellee here was a coal importer, selling coal in San Francisco, the general coal market for central California, Nevada and Arizona. The coal carried on the "Columbia" was sold to the Western Fuel Company, under a contract made the 24th day of November, 1906, that is *over a year before* the congestion in San Francisco (page 78). The "Columbia" was chartered by the appellee on June 26th, 1907, or *six months* before the congestion (page 20). Her voyage was clear across the Pacific and the date of her arrival could not have been foretold within a month's period.

It further appears that it is necessary, and the practice, in supplying the territory tributary to the San Francisco market to order Australian coal at least a

year ahead of time, and that all the coal shown to have been brought in by the appellee was brought in under agreements made about a year previous (page 84).*

It is uncontradicted testimony, as we read the record, that all the coal that caused the congestion in January, February, and March, had been ordered somewhere about a year before, in response to a demand which had existed for two or three years prior to that time and which had caused a coal famine in the winter of 1906 and 1907.**

J. J. Moore, 59.

F. C. Mills, 84.

The delay to the shipping did not commence until after the first of January, as it appears that the steamer "Jethou", which arrived on November 15th, finished the discharge of her 5830 tons of coal on November 30th, or at the rate of over 500 tons per day and within the contract requirements (pages 131, 129), counting out holidays and rainy days as lay days. The same is true of the steamer "Riverdale", which arrived on December 20th (page 66) and completed her discharge of 5898 tons of coal on January 3rd, also well within her lay days (page 131). J. J. Moore, who had sold for delivery at the different bunkers of the port, states (page 52) that the congestion had

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*We do not find in our opponent's summary this important and seemingly undisputed fact.

**Nor do we find this fact in our opponent's summary.

been continuing several weeks prior to the receipt of notification of the "Columbia's" readiness, sometime after January 18th, and this testimony, coupled with the fact that these other colliers in November and December were discharged within their lay days, would indicate that about January 1st was the beginning of the congestion.*

Nor is it denied that the congestion which filled all the bunkers and coal stowage places in the port (page 52) was caused by the unforeseen financial depression

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*Our opponent states ingeniously at page 6, that the evidence shows that **"within four months prior to March 1st,"** that is subsequent to November 1st, respondent brought over 45,000 tons of coal to San Francisco. The record shows, however, the arrivals were but 26,838 tons, as follows:

Arriving.	Vessel.	Place of Discharge.	Tons
Nov. 9	"Craighall"	Oakland	5630
Nov. 15	"Jethou"	Not at Western Fuel Docks	5830
Dec. 20	"Riverdale"	Not at Western Fuel Docks	5898
Jan. 10	"Camphill"	Western Fuel	5500
Jan. 14	"Columbia"	Western Fuel	2220
Jan. 21	"Lunsmann"	Oakland	1760
	Total		26838

It thus appears that the respondent brought but one cargo, of 5500 tons, into the port in three weeks before the "Columbia's" arrival and but 5898 tons in the month prior to that. As the "Columbia's" lay days did not commence to run, even under the theory of our opponent, until February 7th, the fact that all but the 5500 tons on the "Camphill" had arrived seven weeks before gives a very different impression from a statement that the 45,000 arrived during the period ending March 1st. No cargo brought by respondent, other than the little "Lunsmann" which discharged after the "Columbia", arrived after January 10th. None but the "Camphill's" and the 300 tons of the "Lunsmann" was discharged at the Western Fuel Company's bunkers.

With a population of 750,000 around the Bay of San Francisco, consuming in winter at least a ton a month per family of say ten persons, not less than 75,000 tons would be consumed each month without considering the country demand at all. The amounts above tabulated seem insignificant in comparison with the manifest consumption.

of 1907, which, in closing down eastern manufacturing industries threw into the western market an extraordinary supply of coals.

All the coals brought in by respondent were sold before arrival and hence it was beyond its power to remove them from the bunkers and stowage places in which its vendees had placed them (Mainland, page 66, Moore, page 57). As they were brought in and sold to meet an established demand, and as the national financial depression was entirely unforeseen and in no way attributable to the respondent company, it is apparent that the congestion of the port, causing the delay in discharging the "Columbia" was a *"hindrance beyond the charterer's control"*.

It further appears that not only was the general congestion due to causes beyond the charterer's control, but the congestion at the Western Fuel docks was in no reasonable sense attributable to cargoes which the Western Fuel Company, as vendee of J. J. Moore & Company, may have failed to have taken from their bunkers. No cargo from any vessel chartered by J. J. Moore & Company had discharged at the Western Fuel docks for two months prior to the arrival of the "Columbia".

These bunkers were on three parallel wharves, on the ends of Mission, Howard and Folsom streets, the three streets next adjoining Market street to the south. The three bunkers were operated under one management, hence affording the vessel three times

the chance of furnishing a free dock that she would have if each were operated separately and required a separate designation.

The capacity of the three bunkers is very large; at Mission street they could discharge the "Camphill's" 5500 tons in six days, or about 900 tons a day (page 89). The other two both discharged steamers (pages 90, 91) and must have had at least a capacity of 500 tons per day (page 96). This made a total discharging capacity of 1900 tons a day. It is apparent that the sale of the "Camphill" cargo to the owner of these bunkers would have in no way interfered with the "Columbia's" discharge in any normal condition of the port. As a matter of fact, during the entire depression from January 1st to March 20th, when the "Columbia" was discharged, the record shows J. J. Moore & Company to have brought in but this one other cargo, which had been ordered a year before (page 85). The testimony shows, however, that a great number of cargoes had been brought in by other persons. (Mills, pages 88 to 94).

The only cargo discharged from such a vessel after the arrival and before the discharge of the "Columbia", was from the steamer "Camphill", which arrived *5 days before the "Columbia"*, and a small parcel of 300 tons to lighten the schooner "Lunsmann", so she could enter Oakland creek (133, 61, 62). The "Lunsmann" arrived after the "Columbia", but as the 300 tons was taken from her on a holiday, Washington's birthday, and as holidays were excepted from the

discharging days of the "Columbia", by the terms of the charter party, the latter was not affected by the courtesy to the "Lunsmann". The "Camphill" did not commence discharging till February 6th, the last of the "Columbia's" claimed discharging days, and she consumed but seven of the many days during which the "Columbia" awaited her turn for other vessels to finish discharging.

The testimony is also undisputed that it is the custom of the port, as well as the practice of the Western Fuel Company's bunkers, to discharge steam colliers before sailing vessels, each within its class in turn, in the order of its arrival. The attempt of our opponent's brief to make it appear that this evidence was not evidence of a *general custom* in this port, but merely applied to the Western Fuel Company's bunkers, is not borne out by an inspection of the record.

Smith, pages 95, 96;
Mills, pages 82, 83;
Mainland, 63.

Mr. Smith's testimony (pages 95 and 96) is as follows:

"Q. How long have you been in the coal business yourself?
A. Twenty-six years.
Q. In this port?
A. Yes, sir.
Q. Are you familiar with the custom of the port with regard to the discharge of coal in the port?
A. Yes, sir.
Q. Supposing there are several vessels waiting for discharge at the docks at San Francisco. What is the order in which they would be discharged?
A. Usually at the date of arrival. They will take their turn.
Q. Is there any distinction as between steam and sail?

A. Yes, sir. Steamer have the preference.

Q. What is the reason for that?

A. Well, the cost of maintenance of steamers is a large amount, and they have to keep their crews and force aboard at all times. Sailing vessels can usually get along with one or two men. The expense of maintaining a sailer is very small in comparison with a steamer.

Q. Is there any difference in the rate of discharge between sailers and steamers which also is a part of the foundation of the custom?

A. Yes, sir; the discharge of steamers usually runs from 500 to 1,000 tons a day, and a sailer 100 to 200 tons a day.

Q. Now, as I understand it, the custom of the port is that steamers are discharged before sailing vessels?

A. Always.

Q. And within their respective classes, vessels are discharged in the order of their arrival?

A. Yes, sir, usually.

Q. Is that the custom?

A. That is the custom; yes.

Q. Are you familiar with the custom of other ports?

A. Only at the loading ports of our mines in British Columbia. We load there aboard the vessels.

Mr. HUTTON. I don't think anything in British Columbia is material in this case, or the loading is material. We are dealing with the discharging.

The COURT. Let it go in, and get through with it. It is quicker that way.

Mr. DENMAN. Q. What is the custom at these ports?

A. The same as at San Francisco. A sailer is pulled out, and the steamer put in ahead, and let her wait until the steamer is finished."

The captain of the "Columbia" admitted that the customary place for the discharge of coals was at bunkers and that the Western Fuel Company's bunkers were such customary bunkers (H. Larsen, page 31).

The only serious conflict in the evidence was as to whether J. J. Moore & Company had designated the place at which the vessel was to discharge. Mr. Nelson, the manager of the "Columbia", claimed that he had received no designation, but J. J. Moore testified that he had designated the bunkers of the Western Fuel Com-

pany (page 51). Mr. Moore's testimony is corroborated by Mr. Smith of the Western Fuel Company, who says that the manager of the "Columbia" made frequent enquiries of him, after her arrival, as to when he would be able to get his ship discharged (page 97), thus showing that he knew he was going to the Western Fuel Company's bunkers, and contradicting his testimony (Nelson, page 37) that he did not know the discharging place until March 16th, 1908. Manager Nelson's testimony is further contradicted by his admission that in observing the weather, to compute his lay days, he went down *every day to the bunkers of the Western Fuel Company* to see whether the rains interfered with their working there (Nelson, pages 73, 69).

Mr. Moore states that he had this conversation with Mr. Nelson about two days after the arrival of the vessel, that is to say, on the 16th of January, 1908, the vessel having arrived on January 14th (page 27). Notice of the arrival was served at noon on the 15th (page 27), thus making the designation of the dock on the first day after the service of notice of arrival. Mr. Nelson admits two conversations with Mr. Moore, one of them a long one, between January 15th and 18th.

On this testimony, all of which was *viva voce* before Judge De Haven, the court found that the charterer had, within reasonable time after the notice of arrival, properly designated the place at which the vessel should discharge. Under the rule now well established, Judge

De Haven's finding, based on such conflicting evidence, will not be disturbed.

La Bourgoyne, 144 Fed. 781, at 783;
Coastwise Transportation Co. v. Baltimore Steam Packet Co., 148 Fed. 837 (C. C. A.).

To summarize the facts, it appears that they are as follows: That J. J. Moore & Company made a contract for the sale of the Australian cargo in question over a year before its arrival and chartered appellant's vessel to bring it here over six months before its arrival; That she arrived on January 14th, 1908, when there was a coal congestion in the port and all the coal bunkers of the harbor were several weeks behind in handling their cargo; That the congestion was due to the presence of coal ordered to satisfy a market which had been established for several years, but which had been suddenly lost by the unforeseen effects of a great national depression; That neither J. J. Moore & Company nor its vendee, the Western Fuel Company, had any control over the undisputed cause of the glut, i. e., the unexpected financial depression; and That J. J. Moore & Company could not have removed it from the bunkers, as it owned none of the coals, they having been sold before arrival; That on January 15th the ship served a written notice of arrival; That on January 16th J. J. Moore & Company directed her discharge at the bunkers of the Western Fuel Company and on January 18th she mailed a notice of alleged readiness to discharge, which notice was received, but the date of

its receipt not proved, probably, when we consider the delay of registered mail (page 35), and that Sunday, a holiday, intervened, not before the 20th; That the vessel was prevented from discharging by the crowded bunkers and stowage places, and the presence of vessels which, under the custom of the port, had precedence over her; That she reached her discharging berth on March 16th, 1908, and completed her discharge on March 20th, 1908.

It is apparent that the owner of the vessel and the owner of the cargo were both seriously damaged by the delay—the owner of the vessel lost the use of his ship and the cost of keeping a watchman on board her—the owner of the cargo lost the interest on his investment, in addition to the embarrassment to his business.

The question presented by this appeal is, whether the charter party throws on the shoulders of the charterer not only his own loss but that of the ship owner as well. It is our contention that, under the contract between these two, the losses should rest where they fall, and that each should shoulder the burden of his own injury and no more. Surely there is nothing essentially inequitable in such an agreement, and it becomes a mere question of interpretation whether its terms accomplish that result.

I.

The Two Issues and the Two Burdens of Proof.

There are two issues in this case. The first is, has there been a breach of the contract to take the cargo from the vessel within fifteen days after she was ready to discharge, and notice of readiness served on the respondent? The libelants claim that she was ready to discharge and that notice of her readiness was mailed, by registered mail, on January 18th, and that her lay days expired on or about February 7th, and that we failed to take the cargo from her until March 20th. It is our contention that the libelant has failed to maintain its burden of proof as to her readiness when the registered letter was delivered, probably on January 20th, and that she was not ready to discharge until she reached her berth on March 16, 1908.

The second issue is an affirmative defense. It is that, granted the vessel was ready to discharge January 20, 1908, nevertheless, the charterer is excused under a separate clause of the charterer as the delay was due "to a hindrance beyond his control".

There are many authorities treating of each of these two issues, cases which we believe have been confused in our opponent's brief. We shall consider the two issues separately in Sections II and III of this brief and classify the cases under the proper heading, trusting we may be able to clarify what might be to our disadvantage to have confused. In Section IV we take up seriatim the points of our opponent's brief.

II.

The Lay Days Did not Begin to Run Until March 16th, When the "Columbia" Was Ready to Discharge at the Berth Directed by the Consignee.

The question under the first issue is, when did the "lay" or loading days of the vessel begin to run, and the pertinent clause is:

"To be discharged as customary, in such customary "berth as consignees shall direct, ship being always "afloat, and at the average rate of not less than 150 "tons per weather working day (Sundays and holidays "excepted), to commence when the ship is ready to "discharge, and notice thereof has been given by the "Captain in writing; If detained over and above the "said laying days, demurrage to be at 3d. per register "ton per day."

The condition precedent to the running of the lay days is that the vessel shall be "ready to discharge", which discharge is to be "in such customary berth as the consignees shall direct". It is our contention that it is the law both of America and England that under such a clause a vessel is not ready to discharge until she is in a position to deliver her cargo to the consignee in the berth designated to her.

As a matter of common sense analysis, the receipt of the cargo on the dock, which is, after all, the sole purpose of a contract of carriage, is just as impossible when the vessel is lying in the stream a quarter of a mile off, as when she is at sea with her voyage but half

completed. After the designation of the dock there is still much to be done by the vessel herself in which the consignee can take no part at all, before the "discharge" with its mutual co-operation of consignee and the vessel can take place. The vessel is not ready to discharge, that is ready in the sense of having done all the things she has to do by herself, till she is in her berth.

It is in this latter sense that the courts have interpreted the phrase "ready to discharge" in charters carrying coal and other bulky cargoes, which under modern conditions are required to be unloaded by special machinery and appliance at bunkers and other suitable structures.

The law is summarized in the very able opinion of Judge Putnam, speaking for the Circuit Court of Appeals, as follows:

> "According to the primitive rule, a charterer who agrees to furnish a cargo for a vessel and to discharge it is bound to have the cargo ready when the vessel is ready, and to receive the cargo immediately on its arrival at its port of destination. This primitive rule applies to all contracts concerning the handling of merchandise, alike of sale, transportation, or bailment of any kind; but, within the last century, *in view, partly, of the necessities of coal ports, and of ports for shipment and receipt or ores and grain, and the modern facilities peculiarly provided at terminals for handling the immense masses of such merchandise now required to* be handled, this rule has somewhat yielded, as is fully explained in Scrutton's Charter Parties and Bills of Lading (5th Ed., 1904), 17 to 22. This has gone so far that this author says in effect, at pages

259, 260, 261, that a mere obligation to load or unload imports a stipulation that the work shall be done according to the settled and established practice of the port. Mr. Scrutton says, in effect, at page 260, that it has needed a long series of decisions to accomplish this proposition. The same series of decisions has also established the further proposition that aside from any peculiar custom, the consignee has a right, to a certain extent to select a particular wharf or berth for discharge of the vessel, although that berth or wharf may be occupied when the vessel is ready to unload, for that reason delaying her; and this not only under charter parties like those now before us containing the words 'as ordered', but also where neither these words nor an equivalent expression are found. This is not only the settled law in England, but it is the apparent law in the United States.

"Accordingly, alike with regard to the port of loading and the port of discharge, large margins are given charterers which have resulted in long detentions of vessels, extremely burdensome, but for which compensation has been refused."

* * * * * *

"Apparently, therefore, the law is as claimed by the W. K. Niver Coal Company, that the former customary words in charters, namely, 'ready to unload or discharge', 'and written notice given', have no effect except from the time the vessel reaches the precise berth where she is ordered by the consignee to discharge, subject, of course, to exceptions where some special fault rests on him."

W. K. Niver Coal Co. v. Cheronea S. S. Co., 142 Fed. 402 at 406 and 408.

Certiorari refused, 26 Supreme Ct. Rep. 761.

That the period of delay under the rule as laid down by Judge Putnam may cover a number of weeks, is apparent from the fact that in one of the cases relied

upon by him the vessel was detained after the time she should have been loaded more than *fifteen* days and in another over *thirty-five* days.

142 Id., 406, 407.

The delay, after the lay days, in the case at bar was *thirty-seven* days, accepting libelants' view of the case and admitting their claim that their notice of readiness was mailed as registered matter on January 18th, and presuming it was delivered on the 20th, the 19th being Sunday, and admitting the truth of Manager Nelson's statement that there were but six and one-half holidays and rainy days between this and February 11th, when the fifteen lay days must have expired.*

Judge Putnam further reviews the authorities on which he bases his summary of the law, but we do not feel it necessary to burden this brief with a duplication of his work, further than to answer, as we shall do later, certain criticisms of our opponents.

The above language of Judge Putnam's is quoted with approval by Judge Hale, and a delay of fourteen days would have been excused under the rule there laid down, had there not been a violation of a charter provision (not contained in this case) that the vessel should be loaded "in her turn promptly".

Harding v. Cargo of Coal, 147 Fed. 970.

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* The above seems to answer the suggestion on page 5 of opponent's brief that it would be "a vain task to search the law books for any case which holds justifiable" such a delay as in the case at bar. Other cases, both English and American, treating of delays practically as long, are later considered.

In the case of *Dantzler Lumber Company v. Churchill,* the Circuit Court of Appeals, through Pardee, says as follows:

> "The charter-party provides, 'It is agreed that the lay days for loading shall be as follows: Commencing from the time the Captain reports his vessel *ready to receive or discharge cargo* * * *'. The Master testifies that she was ready to receive cargo on the 16th and that he gave verbal notice to the Dantzler Company * * * on the 17th * * *.
>
> "As the evidence fails to show that the 'Hornet' was at her wharf in Gulf Port before the 18th and as the general rule is that the *notice of the ship's readiness to receive cargo can be properly given only after* the ship is ready *and at her proper place for loading* (see MacLachlan, 411), we take it that the only sufficient notice given in this case is the written notice given December 18."
>
> *Dantzler Lumber Co. v. Churchill,* 136 Fed. 560, 561.

In the case of *Flood v. Crowell,* the charter provided that the vessel should be discharged at the rate of 250 tons per day and that the lay days should commence "from the time the Captain reports himself ready to "receive or discharge cargo". The Captain reported on arrival when the vessel was herself ready to discharge, but before she had reached her berth. The libel was for five days' demurrage. Judge Pardee, speaking for the Circuit Court of Appeals, comments on the absence of any provision for "despatch" or "quick despatch", and goes on to say:

> "The ordinances regulating the assignment of ships to wharves in the port of Galveston for load-

ing and unloading, *and the custom prevailing in the port of Galveston, requiring, when the wharves are all occupied, that ships shall be assigned in their turn,* were, or should have been, known to the owners of the ship, who, it appears, had sent previous cargoes, under charter parties similar to the present one, to the port of Galveston; and they did know, or should have known, that all the wharves in Galveston were public, and could not be controlled by consignees. Being charged with this knowledge, if the owners desired to make consignees liable for delays of the kind, they could and should have provided for the same in their contract. Having failed to make such provision, and the consignees not being bound, under our construction of the charter party, to immediately furnish the ship a wharf at which she could discharge without delay, we cannot find that for the delay in this case the consignees were in any wise in default."

Flood v. Crowell (C. C. A.), 92 Fed. 402 at 405.

In *Earn Line Steamship Co. v. Ennis,* 157 Fed. 941, the court states the question as follows (page 942):

> "The libelant claims that the 'Dania' arrived at Santiago on June 11, 1903, was ready to load and in free practique at 11:30 a. m., and that the lay days commenced at 12 o'clock noon of that day, whereas the *respondent insists that the vessel did not arrive at the loading berth* on June 11, 1903, until 12:10 o'clock p. m., and that the lay days did not commence until June 12th at 12 o'clock."

and then gives its conclusion as follows (page 943):

> "There was no evidence submitted in this case, on the part of the respondent, but that taken by the libelant establishes to my satisfaction (1) that *the steamship 'Dania' was not ready to load at Santiago until after 12 o'clock of noon of June 11, 1903,* and as a result, under the charter party, lay days did not commence to run until 12 o'clock noon of

> June 12th, the following day, and the retention by the respondent of the sum of 72.04 as dispatch money for the time saved in loading was properly deducted."

The decision of the District Court was affirmed by the Circuit Court of Appeals in *Earn Line S. S. Co. v. Ennis,* C. C. A. 165 Fed. 635.

In *U. S. v. J. J. Moore,* where the general subject of the duties of the ship were under discussion, the Supreme Court said:

> "The wharf, under the contract, was the place of destination, and the appellant took the chances, as observed by the court of claims, of obstacles which should intervene to delay the delivery of the coal at the wharf, as they did of other obstacles which might have intervened to prevent the coal reaching the harbor."
>
> *U. S. v. J. J. Moore,* 196 U. S. 157.

Hutchinson, in his work on the American Law of Carriers, lays down the rule as follows:

> "Sec. 848. Lay days at the port of loading do not begin to run against the charterer until the Master gives notice to the charterer that his vessel is ready to receive cargo. Such a notice can properly be given only after the ship is ready and *at her proper place for loading.*"
>
> *Hutchinson on Carriers,* Vol. II, page 939.

> "Sec. 850. When the charter party provides that the cargo is to be delivered at any safe berth 'as ordered' on arrival in the dock, the words 'as ordered' would have no meaning *unless they gave the charterer an option to settle the end of the voyage.* In such case the option is in the choice of a berth, and the carrying voyage ends, not on the arrival of

the vessel in the dock, but on her arrival at a berth as ordered. If a strike occurs among the dock laborers after the order has been given to go to a certain berth, the charterers will not be liable for a delay occasioned by their refusal for some time to order the vessel to another berth not affected by the strike. *Nor will they be liable for a delay occasioned by the ship being unable to proceed to the designated berth owing to the crowded condition of the dock.*"

Hutchinson on Carriers, Vol. II, page 941.

This brings us to the case of *Percy v. The Union Sulphur Co.,* 173 Fed. 534, decided in the District Court by Judge Hale. Judge Hale, as we have shown, approves the rule laid down by Judge Putnam in the W. K. Niver Coal case as to the interpretation of the words "ready to discharge", and as he makes no distinction here, it is apparent that he had not changed that opinion. The decision is manifestly based on a subsequent agreement between the parties as to when the lay days began to run. In the case at bar there is no such agreement, but, on the contrary, the correspondence shows that there was a disagreement. The significant thing about each of Mr. Moore's letters is that it claims the benefit of the custom of the port in the computation of the demurrage days. In his letter of February 10th, Mr. Moore says:

"Under the most favorable circumstances, in consideration of the Charter Party, they will not expire before the night of Thursday, the 13th inst., and we further beg to advise you that the matter will be handled **as customary,** when the time arrives. * * * However, be this as it may, the vessel will be **discharged in her turn,** as customary."

Apostles, 128.

"They are not as yet up, nor will they be for some days to come. When the vessel is discharged her **demurrage** will be treated in the **usual and customary way.**"
Apostles, 125.

The most that can be said for Mr. Moore's letters is that they recognize that the ship was claiming an early expiration of her lay days and that he was answering that even under the most favorable interpretation of the charter party the ship had underestimated the number of lay days, and that in any event he would not be liable for prevention of delivery due to delays arising from the custom.

Judge Hale's decision does not consider any such clause, as is in the charter party at bar, exempting the charterer from delays from "hindrances beyond his control". It is apparent that even if the parties agreed when the lay days had terminated, this would not make the charterer liable if the delays thereafter were due to such hindrances. This clause receives a full treatment in our next section.

The Percy case is further distinguishable from the case at bar, as the charter there considered did not give the charterer an express option to choose the discharging berth, and did not provide who was to dock the ship. In the charter party at bar the charterer has the right to "*direct*" the ship to a dock. The duty to dock is hence in the ship (Apostles, page 21), and the *ship* must pay for one shift of the vessel even after discharging has commenced (Apostles, page 23).

The English authorities show the law in England to be the same as in America. It is unnecessary to at-

tempt a review of the history of the law which finally crystallized in *Tharsis Sulphur & Copper Co. Ltd. v. Morel* (1891), 2 Q. B. D. 647; VII Aspinall, 106; and *Murphy v. Coffin,* 12 Q. B. D. 87; V Aspinall 531.

In the Tharsis case the charter gave the charterer the option of selecting a berth at the vessel's destination. On her arrival all the berths were occupied, just as in the case at bar (testimony of J. J. Moore, page 52). She was delayed for some time and her owners sued for the demurrage. It was held that the lay days did not begin to run till she was in her berth, ready to discharge. Lord Esher, Master of the Rolls, says:

> "Now this contract does not name any particular berth; it says 'any safe berth as ordered', which must have meant 'any safe berth as ordered by the charterers'. Does that give them the right of fixing the place where the carrying voyage is to end? Even if the case stood alone I should say that the right was given to the charterers; but the case of *Tapscott v. Balfour* (ubi sup.) has dealt with this form of words, and the court there held that in such a case as this the charterer has power to fix what is to be the end of the carrying voyage, and the consequence of his doing so is the same when he has given his orders as though the place had been named in the charter-party. That case was decided nearly twenty years ago, and being a decision on the meaning of a mercantile contract in a form frequently used by merchants, we ought at this distance of time to follow it, unless fully convinced that it was wrong. But, apart from that, I think, as a matter of reason, that the case was well decided, and no effect would be given to the words 'as ordered' unless it is held that the order, when given by the charterer, settled where the voyage is to end as much as though the place were named in

> the charter-party. When, therefore, the option in this case of naming the berth was exercised the effect was the same as though the berth had been named in the charter-party."
>
> *Tharsis Co. v. Morel,* VII Asp. 107, 1891, 2 Q. B. D. 647.

Bowen, L. J., and Fry, D. J., agree with Lord Esher in separate opinions. The remarks of the former to the effect that "The most that can be said is that the "charterer does not exercise his option unless he "names a berth that is either free or soon likely to be" are manifestly but summary of the two cases of *Ogden v. Graham* and *Samuel v. Assurance Company,* which were claimed to be favorable to the ship owner. The term "berth that is free or soon likely to be" cannot refer to the facts in the case Bowen was deciding. The berth designated in that case was neither free nor soon likely to be, as the congestion lasted for some days, and yet he held that under the charter, the charterer could designate such a dock and the discharging time would not begin to run till the other vessels had vacated it and the vessel in question had moored there.

The pertinent portion of *Murphy v. Coffin* is cited by Judge De Haven in his opinion. We have nothing to add to this save that the Court of Appeal has, in its latest case on the subject, reviewed all the cases, and reaffirmed the doctrine laid down in *Murphy v. Coffin* and the Tharsis case. In this latest decision Judge Buckley describes the Tharsis case as a "salient and principal authority", and Judge Kennedy says that it

settled the law on the cases where the option of fixing the discharging place is given the charterer. Lord Alverstone agrees with both judges.

Leonis S. S. Co. v. Rank (No. 1), XIII Com. Cases 136 at 143 and 151 (1908).

In the latter case the vessel was obliged to wait her turn from February 22 to April 5th before she was loaded, that is to say for *forty-four* days. The Court of Appeals holds that as the charter did not contain any provision giving the consignee the right to choose a berth, the lay days began as soon as the vessel arrived at the port and the rule in the Tharsis case did not apply. They are all agreed, however, that it would have applied and the charterer would not have been liable for *any of the forty-four days' time* if (as in the case at bar) he had had the option of choosing a dock expressly given him in the charter. It is well to note that in the Leonis case *No. 2*, a second appeal in the same litigation, the Court of Appeals did excuse the charterers from all liability on the ground that the delay was a "hindrance beyond the charterer's control". This decision we treat later under our second issue, merely calling the court's attention to the fact that there are these two late English cases, in both of which the reasoning supports our contention, and one of which decides our exact question.

It will surprise many members of our Federal bench to learn that *Scrutton's Charter Parties* is a compilation biased by the employment of one of its authors. Very likely our opponents have the knowledge of condi-

tions at the English bar to warrant the attack on so distinguished an author, and yet, somehow, even the English courts seem to treat the work as worthy of consideration. We therefore venture to offer Mr. Scrutton's summary of the law.

> "The commencement and mode of calculation of the lay days will depend on the custom of each particular port."
>
> *Scrutton, Charter-parties,* page 98.

> "If the charterer will not name a wharf or dock, where none is named in the charter, and there is more than one in the port, he will be liable for any damages occasioned by the delay, *but he is not bound to name one that can be reached immediately.*"
>
> *Scrutton, Charter-parties,* page 99.

Applying the above rule of both the American and English courts to the contract made by the parties at bar, it appears that the libelants have not established their condition precedent to recovery, i. e., that the "Columbia" was ready in her berth and notice of her readiness served more than 15 weather working days before her cargo was discharged. On the contrary, it appears that she was not ready in her berth till March 16th and that respondents discharged her within her lay days thereafter.

III.

The Delay in Obtaining a Berth Was A Hindrance Beyond the Charterer's Control, for the Consequences of Which It Is not Liable.

The second issue in this case arises under the following provisions of the charter party:

"* * * Frost, Flood, Fire, Strikes or Accidents at "the Colliery, or on Railways, or any *other* hindrance "of *what nature soever* beyond the Charterer's or "their agents' control, throughout this charter, always "excepted" (page 22).

We claim that under this clause we are not liable, even if the lay days began on the delivery of the letter dated Jan. 18th notifying us of the vessel's alleged readiness, as her delay in reaching her bunkers was due to a hindrance beyond the charterer's control, i. e., congested bunkers and a large number of steamers which had a prior right to discharge.

In our statement of fact, we have pointed out that *all* the Australian coal causing the congestion which extended from January to March, 1908, was imported under contracts made a year prior to that time. That when the orders were placed there was a demand which had been in existence for over two years, and that the amount ordered was not in excess of that demand. It appears, however, that in the fall of that year, that is months after the coal was ordered, and after the charter here in question was made, an unforeseen financial depression of national dimensions destroyed the eastern

market for Rocky Mountain coals and threw them into the territory supplied from San Francisco, causing a glut in that port.

It further appears that all of J. J. Moore & Co.'s coal was sold before arrival, and hence that it had no power, after delivery, to remove its importations from any bunker or stowage place his consignee might leave them in. It further appears that it had brought but one ship load in during the whole month of December before the glut began, and but two ship loads in the previous November, a not extraordinary amount in winter in a market serving over a million and a half of people whose consumption at the rate of a ton a month for say every *twenty* persons would amount to 75,000 a month or 300,000 tons over the four months in question. It further appears that none of these were discharged at the Western Fuel bunkers.

During the entire congestion, up to the time of the "Columbia's" discharge, that is till March 20th, a period of two months and twenty days, the record shows but *one other vessel of respondent to have discharged at San Francisco.* That was the "Camphill", a steamer arriving before the "Columbia" and thus having a preference under the custom of the port, both as a steamer and for priority of arrival.

We have already cited authorities, showing it to be the law of this country that coal and grain cargoes are to be discharged at bunkers and elevators where there are suitable appliances for handling these commodities in bulk. The captain of the "Columbia" admitted at

the trial that the Western Fuel bunkers were such a "customary place".

The Western Fuel bunkers were so capacious that they could *conveniently discharge three steamers at one time.* It is thus apparent that under all normal conditions of the port the fact that the cargo of the "Camphill" was sold to the Western Fuel Company and that she would have to occupy one of these three places for vessels would have had no effect on the discharge of the "Columbia" within her lay days. As a matter of fact she did not *begin* to discharge until the very last of the "Columbia's" discharging days as computed by libelants and then occupied one of the three places but seven of the thirty-seven days the "Columbia" was in demurrage according to their theory.

It further appears that at the time Mr. Moore directed the "Columbia" to the Western Fuel bunkers **all the coal discharging bunkers in the port** were several weeks behind in handling their vessels (J. J. Moore, page 52).

At the trial it was suggested that Mr. Moore was not a competent witness, as he relied on the statements of others in determining that the bunkers were several weeks behind. But how in the name of common sense would he know they were behind save by such enquiry? All his eyes could tell him on an inspection of the water front would be that there were vessels discharging there. What the date of arrival of any vessel was, what other vessels lying in the stream antedated or post dated in arrival those at the bunkers, what cargoes they had, and what lay days their charters provided—all these are

things that the merchant must learn from his associates in the trade. With his twenty-five years' experience and his large stake in the business, he was in a position to give an expert opinion on the discharging conditions of the water front at that time.

However, it is apparent that the depression had caused a universal congestion of coals in the port, and, entirely aside from the testimony of Mr. Moore, this could reasonably be inferred from other evidence.

The "Columbia's" discharge was prevented by the presence at the bunkers of steamers which had the preference both by the custom of the port and the practice of the bunkers and by the time occupied in removing coal from the bunkers to make room for other cargoes (Mills, 94). Some of the vessels, other than the "Camphill", which held back the "Columbia" under this custom of the port were the "Bankfield", "Cecil", "Riverforth", "Gymeric", "M. F. Plant", "Hornelen", "Yeddo", "Turgenskygold", "Finn", "Indra" and "Solatio". None of these were chartered by J. J. Moore & Company. We thus see that but one of the twelve steamers having preference belonged to respondent.

The House of Lords has recently held, in construing a charter party identical with that at bar, that a delay caused by vessels waiting their turn under the custom of the port was a "hindrance beyond the charterer's control" and that he was not liable for its consequences.

> "The Lord Chancellor (Lord Loreburn). I think that this judgment ought to be affirmed. The

> question arises upon a charter-party, the relevant words of which have been referred to fully. In my opinion, the hindrance which delayed the shipping in this case was a block of steamers waiting their turn. I think that it was only the block which caused the hindrance. It was argued that this hindrance was not beyond the control of the charterers *because they had certain other ships which took turn before the vessel in question,* and so delayed her. I think that the best answer to that contention is that the facts do not establish that those vessels were responsible for the delay in question."
>
> *Larsen v. Sylvester,* XIII Com. Cases, 328.

Lord Ashburn and Lord Robertson wrote concurring opinions and there was no dissent. These opinions also dispose of our opponent's contention that the words "other hindrance of what nature soever" are narrowed to include only those matters which are *ejusdem generis* with the exceptions previously enumerated. They hold the common sense view that this means just what it says, "*all other* hindrances", not only of the same nature, but "of what nature soever".

The English Court of Appeal followed this rule in *Leonis v. Rank No. 2,* where the delay lasted *forty-four* days and held that as it was caused by vessels waiting their turn under the custom of the port, it was an "obstruction in the dock" beyond the charterer's control for which he was not liable.

> *Leonis S. S. Co. v. Rank No. 2,* XIII Com. Cases 295, affirming Judge Bingham, Id. 161.

The same rule was laid down by the Circuit Court of Appeals for the Second Circuit, where the law is stated as follows:

"The vessel was delayed *two weeks* by the arbitrary action of the Pennsylvania Railroad, which instead of giving her proper dispatch, postponed her admission to a berth until after other vessels, which came later, but which happened to belong to shippers whom the railroad favored, had been admitted and loaded. The cause of this delay in loading was evidently 'beyond the control of the charterers' in the ordinary use of that phrase, and we are not persuaded to the conclusion that it means anything else because it is included in the same sentence with 'strikes or any other accidents". She was deprived of her turn because a third person, who controlled the situation, refused to let her have it, and such deprivation was the proximate cause of the delay."

Pyman S. S. Co. v. Mexican Cent. Ry. Co., 169 Fed. 281, 283, reversing Id. 164 Fed. 441.

In that case, as in the case at bar, the other bunkers of the port were occupied. The delay amounted to two weeks. If the charterer is excused where the delay is due to the caprice of a dock owner, then *a fortiori* must it be excused when it is due to a glut arising from a great financial depression, for which none of the parties are in any way responsible and which could not have been foreseen.

The case at bar is clearly distinguishable from *W. K. Niver Coal Co. v. Cheronea Steamship Co.,* 142 Fed. 402, where the charterer had *five* steamers "voluntarily bunched" in the port of Boston in November, 1902, at the same time (page 411) *which were all chartered in October or November, i. e., within two months prior, for voyages from Cardiff, Wales* (page 403). Ths is very different from having one vessel in twelve causing the

delay of the "Columbia", whose arrival after her long sailing voyage across the Pacific could not possibly be determined within a month's period, and where the cargo carried by both was ordered a year before.

The same is true of *Schwaner v. Kerr,* recently decided in this court. In that case the charterer had *nine other* vessels in port, with a total grain capacity of 46,500 tons, which in themselves required "more "grain than the usual deliveries by rail would bring "to the dock". It was held by the lower court, 170 Fed. 92, that a delay from this cause was not "beyond the charterer's control" and hence he was not excused. The case is clear authority, however, for the proposition that the mere presence of other vessels brought in by the charterer does not make the hindrance one for which he is liable. The true test is, has he brought in vessels in excess of the conditions reasonably to be expected in the port. In the case at bar it is not contested that J. J. Moore & Company and all the importers had made their arrangements a year ahead for a demand then several years in existence and which they had no reason to believe would be discontinued.

Schwaner v. Kerr, 170 Fed. 92.

On the appeal the point was pressed that the delay was due to the failure of the road to bring to the port a special kind of wheat intended for the particular vessel. The court, in an excellent opinion by Judge Morrow, says:

> "If the respondents had the ample cargo of wheat of particular quality with which to load the 'Tiberious' within the time specified, as they say

they did, they should have notified the railroad company to carry and deliver the particular quality of wheat that was to constitute that cargo from such places and at such times as would enable them to load the vessel within the time limited in the charter party. Had they given such a notice and had the railway company then failed to transport such wheat to the place of loading, a different question could have been presented. But the respondents failed and neglected to give such notice, and this neglect is sufficient in our opinion to deprive the respondents of any extension of the period for lay or working days on account of a delay or hindrance in the movements of cars claimed to have been beyond his control."

Kerr v. Schwaner, C. C. A. 9 Cir., 1747, Feb. 7, 1910.

In the case at bar, it is not questioned that J. J. Moore made repeated requests of the Western Fuel Company to hasten the "Columbia's" discharge (99-100)—nor is it questioned that she was discharged in her turn, according to the custom of the port and the rules of the Western Fuel Company's dock.

In concluding this branch of the case, we cannot but comment on the continual insistence of our opponent on the length of time the "Columbia" was delayed. We believe that we have shown that on her own theory she was in demurrage less than thirty-eight days, but three days more than those for which charterer was held excusable by the English Court of Appeal in *Leonis v. Rank No. 2,* and by our Circuit Court of Appeals in the cases relied on in *Niver Coal Co. v. Cheronea S. S. Co.*

In *The Toronto,* 174 Fed. 632, the delay was caused by a longshoremen's strike which lasted 42 days. The vessel came in at the end of the strike and was affected but five days, for which the charter exception excused the owner. It is apparent from the opinion that the Circuit Court of Appeals would have decided the same way even if she had been delayed during the entire strike.

If the principle be correct, i. e., that we are not liable for delay from causes beyond our control, then it matters not whether the delay be for an hour or a year, so long as we are not responsible for it. It is submitted that the court cannot hold the respondent liable in this case without overruling both the Circuit Court of Appeals of the Second Circuit and the House of Lords, but also violating the principle controlling both the Niver Coal case and *Schwaner v. Kerr.*

As we have before pointed out, such a delay damages the charterer who cannot make delivery and hence collect from his vendee, as well as the owner who cannot use his vessel. There is nothing inequitable in leaving the loss where it falls—on the shoulders of each.

IV.

Summary of Answers to Our Opponent's Arguments.

We now consider seriatim the points made by our opponent's brief.

A. *The vessel was an "arrived ship" when she reached the port* (page 9 appellant's brief). This is undoubtedly true for the purpose of giving the consignee notice of arrival so he can select a dock for her. It is not true for the purpose of giving notice that she is ready *to discharge cargo,* as is shown by the many authorities both of the Federal Circuit Court of Appeals, the English Court of Appeals and the Queen's and King's Bench, cited under Section II supra, to the effect that a vessel is not ready to discharge till she is in her berth. It should be noted that there is no such phrase in the charter as "arrived ship", and we are concerned solely with the phrase "ready to discharge".

B. *The designation was insufficient* (page 29 appellant's brief). Judge De Haven's finding is sustained by the evidence. The bunkers were under one management and the "Columbia" reached the first of the three available spaces in them in her turn. No more definite designation than the Western Fuel bunkers could have been given, and it was to the ship's advantage that there was room for more than one vessel.

C. *The designation must be of a berth which will be vacant in a reasonable time* (page 32 appellant's brief).

None of the Circuit Court of Appeals cases makes such a distinction, and it is apparent that there is nothing in principle to warrant. If the condition precedent is "readiness in berth to discharge" then that is the contract, whether the vessel waits a long or short time. As we have shown in Sec. II supra, the Circuit Court of Appeals, in laying down the rule in *W. K. Niver Coal Co. v. Cheronea S. S. Co.,* 142 Fed. 406, 407, contemplated delays of 35 days and 15 days; and in the Toronto, 174 Fed. 632, 42 days. The English Court of Appeal in *Leonis S. S. Co. v. Rank* (1908), its latest case on the subject, lays down the rule with reference to a case where the delay was 44 days.

We have already shown that Lord Bowen's language in *Tharsis Co. v. Morel* is simply a summary of other decisions and that he held the delay excusable in the case before him when the berth was neither ready nor likely to be for several days.

The words quoted from *Carlton S. S. Co. v. Castle,* 8 Asp. 325, 326, concern a charter party in which there was no clause, as here, fixing the lay days commencing when the ship was "ready to discharge". In fact there is no provision in the charter party at all fixing the lay days, and all the case holds is that in the absence of the lay days, the charterer should be discharged in a reasonable time.

The words quoted by our opponent are from the lower court. On the appeal the House of Lords holds

that, under such a charter, the charterer may select a berth at which the ship must necessarily be delayed for a considerable time if that is *the general condition of the harbor.*

Carlton S. S. Co. v. Castle Mail Co., VIII Asp. 403.

As we have already shown, when Mr. Moore designated the Western Fuel Docks as the place of discharge, *all the bunkers at which coal is customarily discharged were three or four weeks behind time.*

In *Evans v. Blair,* also cited by our opponent, Judge Putnam uses the language below quoted which, taken in consideration with his opinion in *W. K. Niver Co. v. Cheronea S. S. Co.,* supra, shows that he contemplated delays at least of 35 days in length:

> "Charter parties and bills of lading which provided for loading or discharging an entire cargo at ports where there were several berths for loading or discharging, and which have been under discussion in the English courts, contained the expression, 'at any safe berth as ordered', or its equivalent. Murphy vs. Coffin, 12 Q. B. Div. 87; Copper Co. vs. Morel (1891), 2 Q. B. 647. The result of this class of cases, after some fluctuation, has been to leave the consignee a somewhat unlimited power in the matter of selecting the berth, regardless of its crowded state, provided, only, it is a safe one. This, however, comes from the fact that the charter party, or bill of lading, contained express language favorable to the consignee, and from the application of the well-known rule that where, in maritime contracts, *parties have seen fit to choose fixed forms of expression,* the great variety of contingencies incidental to maritime transactions *disenable the courts* from establishing any safe theory by which

> the letter can be *modified to meet any supposed intent.* Practically, therefore, this case comes down to the mere question whether or not the vessel was given her turn, subject to *whatever customs or necessities* existed at the *port of discharge* which might be fairly within the contemplation of both parties."
>
> *Evans v. Blair,* 114 Fed. 616, at 618, 619.

In the case at bar the charter uses a "fixed form of expression", i. e., "ready to discharge", which by the interpretation of the Circuit Courts of Appeals in this country and the King's Bench, Queen's Bench and Court of Appeal in Great Britain, means ready *in berth* to discharge.

In the case of *Williams v. Theobald,* 15 Fed. 465, there was no provision, as here, that the lay days were to begin after the vessel was ready to discharge, and hence the contention sustained in the later Circuit Court of Appeals cases were not considered by Judge Hoffman. The lay days not being expressly agreed to run *"after the vessel was ready to discharge",* the court construed the charter as making them run from the time of arrival in port, and not from the time of her arrival in her discharging berth. In that case it was not shown that there was any custom for the delivery of coal cargoes in rotation. Further, it was shown that the delay at the designated wharf was caused by the charterer's own coals, whereas it is shown in our case that but one of the dozens of vessels discharging at the three berths of the Western Fuel Company in the four months before the "Columbia's" discharge was chartered by J. J.

Moore & Company, and that one a steamer whose cargo was sold a year before arrival and which had arrived five days before the "Columbia". Certainly there is nothing here to upset the later holdings of the Circuit Court of Appeals, or even raise a question as to them.

As we read *Manson v. Ry. Co.,* 31 Fed. 297, there was no provision that the lay days were to commence when the vessel was "ready to discharge". With all the other cases cited by our opponent under Sec. III of his brief, it cannot be said that they contravene subsequent decisions of the Circuit Court of Appeals expressly dealing with the phrase in the charter party at bar.

D. *Charterer prevented performance by ship of her condition precedent of reaching the bunkers* (page 35 brief of appellant).

All the matter of this section has been treated by us under section III of this brief. It is well to note, however, that in so far as prevention of performance of a condition precedent is concerned, the burden of proof is on the libelant.

E. *If charterer has not made a proper designation, then vessel was an "arrived ship" on January 15th* (appellant's brief, p. 49).

In any event the lay days are not to begin to run in this case till "the ship is ready to discharge and *notice "thereof has been given by the captain in writing"* (Apostles, top of page 23).

The letter delivered on January 15th (Apostles, page 123) says nothing about readiness of the vessel to discharge. For all it contains, she might have been on fire, or without her crew, or with her winches broken, or in the hands of the U. S. Marshal. The contract calls for a *written notice* of readiness and none was given until the second letter (Apostles, page 124), mailed on January 18th, as registered matter and delivered probably on the 20th, as the 19th was Sunday. In no event can the lay days be said to commence before this, the 20th of January.

The balance of the contention of this section, i. e., that the designation of the bunkers of the Western Fuel Company was not definite enough and that we did not have them ready soon enough, we have already disposed of in sections II and III, supra.

F. *The custom of the port as to vessels taking their turn cannot vary the agreed number of lay days. The custom is not shown as a custom of the port. In any event the "Columbia" did not have her turn* (page 52, appellee's brief).

We agree that custom cannot increase or decrease the number of lay days, nor do we make any contention that the "Columbia" was entitled to more than fifteen lay days. The question is *when do the lay days begin to run* under a charter party providing that the vessel must first be "ready to discharge"? All the cases we have cited under section II hold that if the owner cannot reach his berth because a custom of the port giving vessels arriving first a prior right to go there, then the lay days do not *begin to run* till that time.

In *Davis v. Wallace,* Fed. Cases 3657, there was no provision in the charter that the lay days should begin when the vessel was "ready to discharge", and as a matter of fact the vessel was *at the wharf* before the delay arose. More important still, the charter there called for "quick dispatch", and all that is there said applies to such a charter party. We have already quoted portions of *U. S. v. J. J. Moore,* 196 U. S. 157, showing that case to be in accord with the principles laid down in section II of this brief.

Further, none of these cases of our opponent's consider the effect of the custom to compel vessels to await their turn under the clause of the charter excusing the charterer for delays from "hindrances beyond his control". All the cases under Section III of this brief agree that a delay from such a cause excuses the charterer, although the number of lay days are expressly fixed by the charter, or even where "customary dispatch" is agreed upon.

Larsen v. Sylvester (H. of Lords), XIII Com. Cases 328;

Leonis S. S. Co. v. Rank No. 2, XIII Com. Cases 295;

Schwaner v. Kerr, 170 Fed. 92;

Pyman S. S. Co. v. Mex. Central Ry. Co. (C. C. A.), 169 Fed. 281.

As to the custom not being shown as a custom *of the port,* we have already disposed of this by our excerpts from the Apostles, supra.

Smith, pages 95, 96;

Mills, pages 82, 83;

Mainland, 63.

It is suggested that there could be no custom because there had been no prior congestion of large dimensions. This is absurd as the custom is to control the ordinary conditions of the port. Do counsel contend that three vessels had never before arrived for the same berth at about the same time? If so there is occasion for a rule as to the order of their discharge. The testimony shows and the court must know from its reading of the cases alone, that the custom to "take turn" exists in practically every large port in the world.

As to the suggestion that the "Columbia" did not have her turn because, on Washington's birthday, a holiday, which under her charter was not a lay or loading day, the little schooner "Lunsmann" used one of the three spaces of the Western Fuel bunkers to discharge 300 tons of coal to lighten so she could enter Oakland creek, we say that this answers itself. At the most, if the "Columbia" had slipped in and out of the dock this *one* holiday, she would have reduced the delay one day.

But as the parties had agreed that holidays should be excepted, and as they are not "working days", even this one day should not be charged against the charterer.

To the suggestion that we were not entitled to a bunker with its modern appliances for removing a cargo, we have already pointed out the testimony of the "Columbia's" captain to the effect that it was customary to discharge at such bunkers (Apostles, page 31). The court would have taken judicial notice even in the absence of the captain's admission, that this was the practice of all modern commercial ports where grain or coal is handled in bulk.

G. *Cessor Clause* (p. 59, appellant's brief).

The appellee makes no claim that it is excused under the cessor clause.

H. *Lay days* (p. 59, appellant's brief).

We have already shown that no notice of readiness was mailed till January 18th, and that as it was registered, thus consuming time in the post office, and as the 19th was Sunday, it could not have been delivered till the 20th. The lay days, applying our opponent's theory

and accepting his testimony as to weather, are therefore, as follows:

January	21	Clear	1 day	
January	22	Clear	1 day	
January	23	Rain till noon	½ day	
January	24	Clear	1 day	
January	25	Afternoon clear	½ day	
January	26	Sunday		
January	27	Clear	1 day	
January	28	Clear	1 day	
January	29	Worked forenoon	½ day	
January	30	Clear	1 day	
January	31	Clear	1 day	
February	1	Rain		
February	2	Sunday		
February	3	Clear	1 day	
February	4	Worked afternoon	½ day	
February	5	Clear	1 day	
February	6	Clear	1 day	
February	7	Clear	1 day	
February	8	Clear	1 day	
February	9	Sunday		
February	10	Clear	1 day	15 days

This leaves eighteen demurrage days in February and nineteen and one-third to eleven o'clock of March 20th, in all thirty-seven and one-third days as a maximum, even if the vessel had been "ready *in dock* to discharge" when the registered mail letter dated January 18th, was delivered and even if the great financial depression of

1907, and the consequent coal congestion at San Francisco should be regarded as a hindrance *within* the control of the J. J. Moore Company.

In conclusion, we submit that the libelants have neither sustained their burden of proof that the "Columbia" was "ready to discharge" when the "notice of readiness" was served, nor that respondent prevented her from reaching a berth so she could claim she was ready. We further submit that whatever hindrance delayed the "Columbia's" discharge was a hindrance beyond respondent's control.

WILLIAM DENMAN,
Proctor for Appellee.

No. 1808

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

ANDREW ANDERSON et al.,
Appellants,

vs.

J. J. MOORE & COMPANY
(a corporation),
Appellee.

REPLY BRIEF FOR APPELLANTS.

H. W. Hutton,
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S. H. Derby,
Proctors for Appellants.

Filed this.....day of March, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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CRITICISM OF APPELLEE'S STATEMENT OF FACTS.

A comparison of the statement of the facts in the two briefs in this case will, we believe, not be disadvantageous to the appellants. Appellee's statement comes far from being an impartial one and greatly exaggerates the existing situation at the time. In our opinion the "extraordinary" aspect of the conditions prevailing lies not in the contract for the sale of the coal having been made "over a year before" and the charter "six months before", the change of conditions in "territory tributary to the San Fran-" "cisco market", the "unforeseen financial depres-

sion" (coming after the great disaster of 1906) and the "glut" of coal, but in the fact that the "Columbia" was detained for 67 days in San Francisco in order to meet the business convenience of J. J. Moore & Company and the Western Fuel Company. Unquestionably no prudent shipowner would have chartered his vessel with any such detention in mind. Unquestionably also the right to so detain the vessel was not in accord with the intention of the parties at the time the charter was made. The question, therefore, is whether the terms of the charter party *require* such a construction, and we submit that the court should not attribute such a result to any *doubtful* terms.

Counsel overstates the conditions which existed. The evidence is uncontradicted that an unprecedented amount of coal was brought in during the period in question:

> "Q. Is it not a fact, Mr. Mills, that the imports of coal into San Francisco from Australia during the last half of 1907 and the first half of 1908 were unprecedented?
>
> A. Yes, sir, I think there was a larger amount come in during that time, that is, as far as my memory serves me."
>
> (Mills, 92, 93.)

> "Q. Was the amount of coal that you ordered and came in on those vessels at that time an unusual or extraordinary amount for you in your business to import?
>
> A. Of late years, yes. Since the discovery of oil, the importation of coal has not been so heavy until two years ago.

Q. Then there was an increase in the quantity of coal?

A. A large increase in the importation of coal.

Q. What was the reason for that?

A. Principally because they could not get cars to bring coal from the East. We were shipping coal into Nevada and other places where we never shipped before. Oakland, San Francisco and other places that did get coal from Wyoming did not get any coal during the shortage of cars."

(Moore, 58.)

As is well known and as this evidence shows San Francisco was, after the disaster of April, 1906, shipping coal to "places where we never shipped before" and needing more itself because of the shortage of cars which usually brought coal *from the East*. Mr. Moore's further statement (p. 58) that he thought the shortage existed prior to the earthquake is of little weight and the fire conditions undoubtedly *increased* the shortage (Id.). The result of these conditions was the ordering of an *unprecedented* amount of coal by the respondent and others and the making of sales a year in advance. Is it fair to say that a *continuance* of these conditions was necessarily to be expected or that Nevada and Arizona would *always* lack cars to bring them coal from the East? Is it not much more reasonable to say that, with the amelioration of conditions in San Francisco, the cars could be used for other places and the shortage of coal in the tributary territory would grow less? Also, was it not fair to presume from the conditions that there would be a "financial

depression"? We submit that the conditions in San Francisco at the time the "Columbia" arrived cannot be considered as "unforeseen", and that the burden of meeting those conditions should fall on the parties who brought about the congested state of the coal market and not on the innocent shipowner. The coal dealers who ordered this excessive supply of coal (and it is to be noted that Mr. Moore says: " We did not import *one-quarter* of the coal that " came into the harbor" [54]) are, in our opinion, the persons who caused the congestion, and they should have foreseen the result of their scramble to take advantage of an inflated demand for coal and the consequent high prices.

In order to meet the contention that J. J. Moore & Company were not responsible for the delay in the case of the "Columbia", counsel argues for *January 1st* as the date of the beginning of the congestion (for the obvious reason that most of respondent's cargoes came in *before* this time). In support of this remarkable theory he refers to Mr. Moore as saying that the congestion "had been continuing *several weeks*" prior to the "Columbia's" notice of readiness and to the fact that the "Jethou" and "Riverdale", which were consigned to respondent and arrived before January 1st, discharged within their lay days. The argument is wholly unsound. What Mr. Moore in fact said was that at the time of the "Columbia's" notice "the coal bunkers were all " about *three to four or five weeks behind time*" (52). This conclusively shows that the congestion

began long prior to January 1st and is capable of no other construction. The bunkers could not be even two weeks "behind time" at that date because of the few arrivals between January 1st and 18th, much less four or five weeks, especially when we consider their magnificent discharging capacity on which counsel has laid such stress. The congestion *undoubtedly* had existed for some time and J. J. Moore & Company, who imported something less than *one-quarter* of what came in, were undoubtedly "in the rush which created the congestion" (142 Fed. at p. 415).

As to the instances of the "Jethou" and the "Riverdale", *their* cargoes were not consigned to the Western Fuel Company, but to the Pacific Coast Steamship Company (131). It is noticeable that the cargoes discharged at Oakland and by parties in San Francisco other than the Western Fuel Company were never greatly delayed, whereas, the record shows *no instance* of any vessel at the Western Fuel Company's bunkers which was *not* greatly delayed. This goes far to show that the main congestion was at these bunkers, and that there were numerous other places to which the "Columbia" might have been ordered by the respondent where she could have been discharged within a reasonable time.

This showing completely refutes counsel's claim that *all* the bunkers and stowage places *in the port*

were filled.* It also refutes any argument based on the cases of *Larsen v. Sylvester* and *Pyman v. Mex. Cent. Ry.,* where some special concern controlled *all* the discharging facilities. Undoubtedly there was a general overloading of the port and the other coal buyers had all they could do to take care of their own vessels (though it is to be noted that the cargo on respondent's vessel, the "Craighill", was sold to the Western Fuel Company and was promptly discharged *at Oakland* (131)), and also that this gave the Western Fuel Company little chance to dispose of its coal elsewhere, but the real congestion was at the bunkers of that firm and the respondent substantially contributed to such congestion by its contracts with it, and its importation of coal to other parties which rendered the docks of those other parties unavailable. Is it fair or just, under these circumstances, to place the burden of the loss on the shipowner? Can a charterer, when there are numerous places for discharge available, order a ship to the only place which is unavailable and still not bear the loss?

Counsel lays stress on the statement in our brief (p. 6) that "within four months prior to March 1st" the respondent brought over 45,000 tons of coal to San Francisco, and gives us a list of vessels arriving after *November 1st* showing the arrival of only

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* This claim was based on hearsay testimony by Mr. Moore to that effect. The unreliability of this evidence is shown by the statement of the witness that his information was not that the bunkers were full, but that ships were entering them all the time (53-54). As a matter of fact, the bunkers were often unoccupied by vessels for days at a time (Nelson, 44-45; Mills, 89-93).

26,838 tons. If he had examined the evidence cited in support of our statement he would have seen that we also referred to the "Strathnarin" (6007 tons), "Borderer" (5893 tons) and "Valdivia" (5938 tons), which discharged on October 17th, November 4th and November 13th respectively, which would bring the total up to our claim. Apparently, however, counsel desires mathematical rather than substantial accuracy and "within four months" was not exact enough.

Let us here correct another mistake in our main brief. On page 36 we there referred to the "Camphill" as one of the vessels applying on respondent's contract to supply between thirty and forty thousand tons of coal to the Western Fuel Company. A more careful examination of the evidence shows that this cargo (5500 tons) was supplied under *another contract* (Mainland, 79). We apparently did not get to the bottom of respondent's contracts at the trial. This hint as to other contracts is entirely in line with Mr. Moore's plea that he did not bring in *one-quarter* of the coal which overstocked the port.

Stress is laid on the fact that the custom of discharging in turn is a general one in the port and not merely the custom of the Western Fuel Company, as we have contended. Of course, vessels are naturally discharged in turn but when not a single instance is shown, outside of the vessels consigned to the Western Fuel Company, of a vessel failing to discharge within the lay days, the custom is of little

moment. What we meant in saying that the custom was that of a particular firm was that it only applied to vessels consigned to that firm and not to all vessels arriving. A vessel consigned to Oakland or to the Pacific Coast Company might well have arrived after the "Columbia" and have been discharged before her, and many in fact did. No custom would prevent this. Hence the custom was, as we have said, merely the practice of particular individuals and has no significance whatever (see *9 Encyc. Law,* 240-242).

Stress is repeatedly laid on the testimony of Captain Larsen that the customary place to discharge coal was at the bunkers. This evidence is clearly not meant to be exclusive and we make no further comment on it.

Counsel says on page 9 of his brief that "Mr. " Moore testified that he had *designated* the bunkers " of the Western Fuel Company" as the place of discharge. The charter party required the ship to deliver as "directed", and we again contend that Mr. Moore's so-called designation was a mere casual remark, in no sense irrevocable and hence in no sense a sufficient *direction.* Captain Nelson's inquiries at the bunkers of the Western Fuel Company may or may not show that he knew where his ship was to discharge and are in no way inconsistent with there having been a failure to direct him to any berth. As before pointed out the cargo of the "Craighill" was also sold to the Western Fuel Company, yet she was promptly sent to Oakland.

This seems as good a place as any to deal with counsel's contentions as to when the notice of readiness was given. It is alleged in the libel that such notice was given on January 15th (Par. 6, p. 6), and this allegation is not denied in the answer (see p. 18), though it is denied that the vessel was in fact ready. Counsel is now estopped from claiming that said notice was insufficient and a mere notice of arrival. Besides this the notice in question stated: "Vessel is awaiting your orders, and lay days will "commence as per charter party." This could convey no other meaning than that the ship was ready and there is no evidence that respondent did not so construe it. Again, according to counsel's argument (Brief, pp. 36, 44), two notices were required to be given,—one of arrival and the other of readiness to discharge cargo. But the charter party requires no notice of arrival. But one notice is required, that of readiness to discharge, and we submit that this was very properly given on January 15th when the ship, as far as she was concerned, was ready. To say that under the charter party in suit notice is to be given after a vessel is in the berth which the charterer is to secure for her, and to which he has ordered her, is to require a vain and idle act on the part of the vessel.

In closing his statement of facts counsel refers to the equities of the case, saying that both parties were seriously damaged, the owner losing the use of his vessel and the charterer the interest on his investment. Hence, he says, the losses should rest where

they fall. This is an ingenious way of putting the matter. The "interest on the investment" amounts to a paltry $200.00; the loss of the use of the vessel (according to the presumptive evidence of the demurrage clause in the charter) amounts to over $3,000.00. If "there is nothing essentially inequi-" table in such an agreement", our ideas of equity differ from those of counsel. It is, on its face and beyond dispute, an unfair and oppressive bargain and, unless the charter party *requires* the construction that such an agreement was made, such a construction should not prevail. The presumption is strongly against it.

CONTENTION THAT LAY DAYS DID NOT BEGIN TILL MARCH 15TH.

" After the designation of the dock", says counsel, "there is still much to be done by the vessel her-" self in which the consignee can take no part at " all, before the 'discharge' with its mutual co-oper-" ation of consignee and the vessel can take place." What does counsel mean by "much to be done"? All that had to be done was to proceed from the stream to the dock and with this the consignee had everything to do and the ship practically nothing. The ship was ready, as far as she was concerned, and was absolutely at the consignee's disposal. The consignee in this case could have ordered the ship to numerous places and, to meet his own business convenience, he directed her (if it be held that there was a direction) to the most crowded place he could find.

That his contractual relations with a third party made this necessary is a fact with which the ship had nothing to do; his option was unlimited and the final place of discharge subject to his direction. As said in a citation in our opening brief:

> "It is reasonable and just that the charterer, or the consignee, who has the control of the ship, should take the risk of such delays as are more or less subject to his own directions."

Coming now to counsel's cases, we think we can confidently assert that most of his American authorities are not in point. We have sufficiently commented already on the dicta of Judge Putnam in the Niver Coal case. The two cases cited by him and referred to by counsel as sanctioning delays of 15 and 35 days respectively have only to be examined to show how far they come from the case at bar. In the second case there was an express agreement for loading "in turn" by a specially designated coal company. Counsel says that Judge Putnam's language is quoted with approval by Judge Hale in *Harding v. Cargo of Coal,* 147 Fed. 971. Here is the language of "approval":

> "This comprehensive opinion of Judge Putnam proceeds to give an exposition of the present law upon the subject, and sustains the finding of the District Court in New Ruperra S. S. Co. v. 2,000 Tons of Coal, 124 Fed. 937, where Judge Lowell bases his decision upon the leading case of Davis v. Wallace, supra, in which case it was held that the charterers were liable for the delay caused by the vessel waiting her turn. The business reasons suggested by Lord Esher and referred to in Evans v. Blair, supra,

> have led courts in recent decisions to modify what Judge Putnam has called the 'primitive rule'; but in Ardan Steamship Co., Ltd., v. Andrew Weir & Co., L. R. App. Cases 1905, 501, it will be seen that the House of Lords indicates a tendency of English courts to return to something like the primitive rule. In the present attitude, however, of English and American law, it is difficult to determine in each case to what extent business reasons are competent matters of defense. In the case at bar it is clear that there was something more than a mere 'obligation to load and unload.' There was an obligation that the vessel should have her 'turn in loading', and I have not allowed the usage of the port to be read into the contract, so far as that usage relates to permitting steamers, bunker or cargo, to take precedence of sailing vessels. It is clear that, in this case, exceptional conditions and particular circumstances cannot be a defense, unless they are clearly proved. The burden, then, is upon the claimant to satisfy the court *that it was impracticable to load the Dorothy Palmer at any other pier than pier 10.*"
>
> *Id.,* p. 978.

We suggest that the above, taken in connection with Judge Hale's later decision in the Percy case, falls a little short of "approving" Judge Putnam's dicta. As the decision in the Niver Coal case was in favor of the shipowner, we also fail to see the significance of the fact that a writ of certiorari was refused by the Supreme Court.

In the case of *Dantzler Lumber Company v. Churchill,* 136 Fed. 560, there was a special provision that the lay days were not to commence be-

fore December 18th, 1903, and the question related to a notice before that time. If the remarks cited by counsel be at all in point they are directly in conflict with the law as laid down in *Leonis v. Rank,* and it is apparent on their face that they were made without investigation of the law of the subject unless the reference to "McLachlan, 411", whatever that is, be considered as showing such investigation. The main question in that case was as to a subsequent delay after the vessel's lay days had begun.

The case of *Flood v. Crowell,* 92 Fed. 402, was decided by the same judge who wrote the opinion in the Dantzler case. Here again no authorities are cited and the case is unsatisfactory on this account. The facts, however, show that all the wharves in Galveston were public and subject to city ordinances regulating the assignment of ships to berths, and that these were or should have been known to the parties, who had made many similar contracts. Also the custom of "taking turn" there applied to all vessels in port and not merely to the practice of particular individuals. The charter provided for liability for detention "by the default" of the charterer and it was held that, under the circumstances, there was no such default. The case is, therefore, hardly in point, but we must say that it seems to us to be contrary to numerous cases cited in our main brief construing the words "by the default of the charterer".

Earn Line Steamship Co. v. Ennis, 157 Fed. 941, is in no way in point for the question in that case as

to whether the ship was ready was purely one of fact (see same case on appeal, 165 Fed. 635).

The case of *U. S. v. J. J. Moore & Co.,* 196 U. S. 157, needs no comment.

The citations from Hutchinson on Carriers are admittedly against us, but the only case cited on the first proposition is the Dantzler case, supra, and the second one is based solely on *Tharsis Co. v. Morel* and *Sanders v. Jenkins,* referred to and criticized in our main brief. The citations are mere digests from those cases.

The decision in *Percy v. Union Sulphur Co.,* 173 Fed. 534, is not, as counsel claims, "manifestly based on a subsequent agreement", but that agreement is merely referred to as strengthening the court's conclusion that the terms "ready to discharge" mean simply readiness as far as the ship herself is concerned (see p. 537). It is true that that case may be distinguished upon the ground that there was no express option given to the charterer to name a discharging berth, but, as an implied option would exist in any event, this distinction is a fanciful one. The case is directly in point on the meaning of the words "ready to discharge". Counsel later attempts to distinguish the case of *Williams v. Theobald,* 15 Fed. 465, upon the ground that these last mentioned words were not in the charter though an option was expressly given to the charterer to name a berth. The two cases thus supplement each other, for in the one counsel's theory as to the mean-

ing of the words "ready to discharge" is exploded, while in the other his theory as to the option goes by the board. Any distinction of the one case is met by the decision in the other.

We cannot agree with counsel that the statements quoted on page 24 of his brief from *Tharis Co. v. Morel* are mere summaries of other cases.

Leonis v. Rank has been treated of in our main brief. It is true that it makes a distinction between cases where an express opinion is given to the charterer to name a berth and cases where the option is only implied,—a distinction which we believe to be totally unsound. But upon the question of the meaning of the words "ready to discharge" the case is clearly in our favor. In the case of *Sanders v. Jenkins,* 1897, 1 Q. B. 93, the words used were "Time for delivery to count when the steamer is "ready to discharge", and it was decided in favor of the charterers, but in *Leonis v. Rank* it was clearly held that that case could only be supported as proceeding upon an admission of counsel that the words "as ordered" were to be read into the charter party (see 13 Com. Cases at p. 149; 157). Mr. Carver also recognizes this in the last edition of his work (5 ed., p. 824, Note h). It thus appears that in England the terms "ready to discharge" mean readiness as far as the ship herself is concerned, although by the insertion of the magic words "as ordered" in the charter, thus making express an option which was before implied, the charterer may

yet be protected. This distinction, as we have said, is not grounded on reason and was made necessary solely by earlier decisions.

We submit that the present English rule as to the words "ready to discharge" is in accord with the rule of *Percy v. Union Sulphur Co.* and *Carbon Slate Co. v. Ennis,* while no American case has yet squarely adopted the alleged English rule as to the use of the words "as ordered" (not forgetting the dicta of Judge Putnam in its favor). The case of *Williams v. Theobald* and *Carbon Slate Co. v. Ennis* are squarely opposed to the latter theory. If the Dantzler case and *Flood v. Crowell* be admitted to be in point they are only so as to the meaning of the words "ready to discharge", and on this point they are in conflict with the present English rule and with common sense.

Finally we again desire to call attention to the facts of this case referred to on pages 29 to 49 of our main brief, which, we contend, remove this case from the principle of *Tharsis Co. v. Morel* and the English rule as to the use of the words "as ordered".

CONTENTION THAT DELAY WAS DUE TO A HINDRANCE BEYOND THE CHARTERER'S CONTROL.

Most of the points here made by counsel, both as to facts and law, have been already covered in our main brief or in our reference to the facts in this brief, and but little further treatment is necessary.

Stress is laid on the fact that after January 1st only one other vessel of respondent, the "Camphill", discharged in San Francisco. This leaves out of consideration both the "Riverdale" (131) and the "Lunsmann", but, irrespective of this, respondent cannot excuse itself upon any such ground. It had in part (by an importation of something less than *one-fourth* of the coal which congested the port) caused the bunkers to be at that period "three to four or five weeks behind time" (Moore, 52). Nor is the statement that it brought in "but two shiploads in the previous November" strictly accurate. Four of its vessels were *discharged* in November, namely; the "Borderer", "Valdivia", "Craighill" and "Jethou" (Mainland, 61). We have already sufficiently commented on Mr. Moore's testimony that *all* the bunkers in the port were congested.

On page 30 of his brief counsel refers to a long list of vessels which held back the "Columbia". The dates on which these vessels arrived do not appear, but as the "Camphill" arrived on January 10th and the "Columbia" on January 14th, it is fair to presume that the vessels discharging after the "Camphill" arrived after the "Columbia" and there were at least several of these (Mills, 89, 91). Of course, the *additional custom* of having steamers discharge before sailing vessels is made the excuse for this (but cf. *Harding v. Cargo of Coal,* supra).

We have sufficiently discussed the cases of *Larsen v. Sylvester* and *Pyman v. Mexican Central Ry. Co.*

in our main brief. *Leonis S. S. Co. v. Rank No. 2* is not in point for the reason that the delay was caused by a strike, which was expressly provided against in the charter party, and the court refused to pass on the question whether the delay could be said to be due to "obstructions * * * beyond the con-" trol of the charterers". Hence the length of the delay in that case has no bearing on the delay in this. As for the decision of this court in *Schwaner v. Kerr,* the most that can be said is that it leaves the question open.

The distinctions drawn by counsel between the case at bar and the Niver Coal case and *Schwaner v. Kerr* are mere distinctions of *degree.* The fundamental question is whether it can be said that the respondent measurably contributed to the congestion which delayed the "Columbia". If it did, it is not to be excused under the exceptions of the charter.

We submit that counsel has not met our case on this point and has not sustained the burden of proof cast upon him to show that the so-called hindrance was one "beyond the charterer's control". Exceptive clauses are construed strongly against the charterer and, to excuse himself, he must clearly bring himself within such clauses.

CONTENTIONS IN ANSWER TO BRIEF OF LIBELANTS.

Subheadings C and F of these contentions alone need any further reply except that it should be

pointed out that in computing the lay days counsel forgets February 29th (1908 being leap year).

Subheading C. We merely wish to refer to the citations from *Carlton S. S. Co. v. Castle* and *Evans v. Blair* in this connection with reference to the duty to order a vessel to a berth which she can occupy within a reasonable time. Counsel refers to the decision of the House of Lords in the former case. Lord Herschell there says:

> "It was suggested that there are cases in which particular berths are less favorable than others for loading cargoes, and that where the charterer has the right to name the berth it would be unreasonable that he should name a berth which would prolong the loading to the detriment of the shipowner. That is a question which I do not think is necessary to consider, because considerations would arise in that case which have no place in the present. The difficulty in the present case existed in respect not of a particular berth, but of the entire dock."
>
> *8 Asp. Mar. Cases* (N. S.), at pp. 402-403.

In the case at bar, however, it plainly appears that it was a question of "particular berths" being less favorable than others. It was only at the Western Fuel Company's bunkers that the long delays occurred, and for this reason the language of the lower court cited by us is directly in point. This is clearly shown and this distinction between that case and this made manifest by the following passage from Carver (4 ed., Sec. 624b):

> "In Carlton Steamship Co. v. Castle &c. Co., a ship was to proceed to Senhouse Dock, Mary-

> port, and there load, always afloat, as and where ordered by the charterers. On her arrival in Senhouse dock orders were given for a berth in which she could only partly load, without grounding, unless she waited about a fortnight for the next spring tides. The judges in the Court of Appeal were agreed that the order given ought to be for a berth to which the ship could go within a reasonable time, and there load, always afloat. In the House of Lords it was considered that this point did not arise, as the difficulty existed in regard to the entire dock and all the berths in it. The question was whether, having regard to *the tidal conditions of the port,* there had been any unreasonable delay in the loading."

As for *Evans v. Blair,* we expressly admitted that its dicta could be used against us (where the charter contained the words "as ordered"), and for that reason we considered it especially valuable as showing the limits of the rule. The language of Judge Putnam on page 619 of the opinion, and the decision of the case itself in favor of the shipowner, show that the option given to the charterer is not an arbitrary one and the language of Lord Esher (in the Court of Appeal) in *Carlton S. S. Co. v. Castle* is quoted with approval. It is interesting to compare the discharge of the "Lewis S. Goward" in *Evans v. Blair* with the discharge of "Craighill" in Oakland, although the cargo of this latter vessel had been also sold by the respondent to the Western Fuel Company.

Subheading F. Most of the arguments under this heading have already been met. "The little schooner

'Lunsmann' ", as counsel calls her, carried a cargo almost as large as the "Columbia's". She discharged *some* cargo, and it does not seem to us to matter how much, at the Western Fuel Company's bunkers on February 22nd and was finally discharged at Oakland on March 4th (Mainland, 62, 64). Yet she arrived a week after the "Columbia". It is true that holidays do not count as lay days, but they do count after the lay days have run and, furthermore, this seems to us a poor excuse for discharging a vessel out of turn. It is also significant that the "Lunsmann" was discharged *16 days* before the "Columbia". This hardly squares with counsel's remarks as to "the general conditions of the harbor" and again illustrates the point that it was only at the bunkers of a particular concern that the long delays took place.

We respectfully submit that respondent has failed to meet the case made out by the libelants.

Dated: San Francisco,
March 21st, 1910.

H. W. Hutton,
E. B. McClanahan,
S. H. Derby,
Proctors for Appellants.

Note: The citations on pages 42 & 51 of Appellants' main brief should be Carver, Section 627 instead of Carver, Section 623.

No. 1808

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

IN ADMIRALTY.

ANDREW ANDERSON, A. ANDERSON COMPANY (a corporation), JOHN J. BEATON, ANGUS BEATON, EDWARD CARLSEN, HARRY F. CHASE, MALCOLM P. CHASE, L. CHASE, SAMUEL B. CHASE, MARY L. CHASE, WM. B. CHASE, JR., DOROTHY M. CHASE, FRED J. CHASE, GEORGE BOOLE (a corporation), MRS. E. G. BOOLE, HENRIETTA W. HOBBS, E. W. HOBBS, CLARENCE W. HOBBS, EDWARD HENRIX, MARGARET J. WALL, MARION B. WALDRON and HENRY NELSON, Libelants,

Appellants,

vs.

J. J. MOORE & COMPANY (a corporation),

Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF.

WILLIAM DENMAN,
Proctor for Appellee.

Filed this.....day of April, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

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Appellants,

vs.

J. J. MOORE & COMPANY (a corporation),

Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF.

On March 31, 1910, some time subsequent to the argument of this cause, a decision of the Circuit Court of Appeals, *In re Cargo of 3408 tons of Pocahontas Coal,*

175 Fed. 548, appeared in the Federal Reporter. This case reaffirms the principles of the decisions in *Evans v. Blair,* 114 Fed. 616, and *W. K. Niver Coal Co. v. Cheronea Steamship Co.,* 142 Fed. 402, upon both of which we relied in our argument and brief. In this latest case, Judge Putnam clearly lays down the following propositions:

1. That the charterer has the right to designate the wharf at which the vessel shall discharge, even where no specific authorization to designate is given in the charter.

2. That the designation of a crowded dock is justified by the fact that the coals in question were ultimately to be delivered by the consignee at a factory on the line of the railway terminating on the said docks, regardless of whether other discharging places may be ready to receive the cargo; just as in this case the coals were to be delivered by the consignee, J. J. Moore & Company, to the Western Fuel Company, whose bunkers were designated by Mr. Moore on the "Columbia's" arrival.

3. That it is a sufficient designation to name generally the docks of a railway company (just as Mr. Moore designated the docks of the Western Fuel Company), leaving to that company the designation of the specific berth in which the vessel is to lie (175 Fed. 549).

4. That the charterer so designating the dock is not liable if there is a delay in discharging the vessel, through the management of the dock in its customary

way, even though due to a preference of certain classes of vessels arriving after the vessel in question. The appellate court sustains the lower court in excusing the charterer where the delay was caused by the preference given to transoceanic liners which came regularly to the dock and reversed it for holding that the charterer was chargeable for a delay due to a preference given colliers carrying coals to the railway company.

In re Cargo of 3408 tons Pocahontas Coal, 175 Fed. 548, sustaining in part and reversing in part *Ross v. Cargo of Coal,* 165 Fed. 722.

5. That vessels of small capacity, quickly discharged, may be admitted ahead of prior arrived larger vessels if such be a reasonable usage; just as here the "Lunsmann" was permitted to discharge a few tons on a *holiday* to lighten her to go to Oakland Creek.

175 Fed. 554.

Another Circuit Court of Appeals decision relied upon by us at the argument and in our brief was *Pyman SS. Co. v. Mexican Central Ry.,* 169 Fed. 281, where the delay was due to the arbitrary action of the owner of the dock, and it was held that the charterer was not liable. The United States Supreme Court refused certiorari in this case, as reported in 30 Supreme Court Reporter 399.

The above cases seem to dispose entirely of our opponent's contention that the practice of a particular company causing delay at its docks places the blame on the charterer for the failure of the vessel to reach her discharging place. In this connection there is apparently

a failure on the part of the appellant to appreciate that the burden of proof lies upon the vessel and not upon the charterer. When the vessel arrives in port, the following is the order in which the parties to the charter must act: 1. The vessel must notify the charterer that the ship is in port; 2. The charterer must designate a discharging place; 3. The vessel must sail to the discharging place; 4. The vessel must notify the charterer that she is ready to discharge her cargo; 5. The charterer must receive his cargo.

Now it is apparent that the libelant cannot show a breach of contract until it has maintained its burden of proof as to its conditions precedent. The lower court finding on conflicting evidence, that the charterer did designate in proper time a customary place for discharge, to wit, the Western Fuel bunkers, *the burden of proof is then upon the vessel to show* either (a) that she proceeded at once to the bunkers, which it is admitted she did not do, or (b) *that she was prevented by the charterer from reaching the bunkers designated.*

All the testimony as to the prevention of performance by the ship of her condition precedent to sail to the designated bunkers must be viewed from the standpoint of the ship's burden of proof.

If she regarded as untrue Mr. Moore's statement that at the time he designated the Western Fuel bunkers *all* the bunkers in San Francisco were crowded and weeks behind, then she should have produced evidence to rebut his testimony.

If she wished to show that she was prevented by importations of Australian coal by Mr. Moore in excess of the reasonable demand of a year previous (when he placed his orders*) it was her duty to show that his importation was in excess of the reasonably expected demand and that this was the proximate cause of the delay. As the evidence stands, it shows merely that there was more Australian coal ordered by *all* persons than theretofore, and not that *J. J. Moore & Company* ordered more than was its custom, or more than seemed a reasonable amount when it placed its orders. Even if the amount imported was in excess of the prior demand, there is nothing to show that the entire glut was not caused by the importation of other persons. Certainly she has not maintained her burden of proof that Mr. Moore's importations were the proximate cause of the impediments which prevented her reaching the designated dock.

Mr. Moore testified that all his cargoes were sold before arrival and hence, that there was an existing demand for all *his* coal at least, and that he had no power to remove the coal lying at any dock as it was then the property of another person. If *the vessel knew this testimony was untrue* it was for her to show it by a pre-

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* Counsel's reply brief speaks as if it were a matter of significance "that there was another contract" for coal for one of the many vessels described in the evidence. They evidently overlooked the testimony that all the coal in question was ordered a year prior to the congestion. Mills, page 84. It is therefore immaterial how many contracts there were unless the aggregate be shown excessive for the demand then existing.

ponderance of evidence, either on cross-examination or through further witnesses. It is significant that the appellant nowhere replies to this contention of our brief.

On all the points above referred to, we are confident that the evidence affirmatively shows these various facts as sufficient reasons why J. J. Moore & Company's acts cannot be considered the proximate cause of the delay, and hence establish an affirmative defense under another clause of the charter excepting delays beyond the charterer's control. *A fortiori* then, has the vessel failed to sustain its burden arising under the delivery clause of the charter to show a prevention by the charterer of the performance of her necessary condition precedent, namely, that she sailed promptly to the designated wharf.

Counsel in their brief seem to think that because in this case the owner of the vessel loses more by the delay than the owner of the coal, the court must interpret against the charterer the clause providing that the vessel shall be in berth and notice of her readiness served before the lay days begin to run. Suppose the cargo in question had been, as not infrequently happens, of far greater value than the vessel, and that the charterer lost more by being deprived of its possession during the delay than the vessel owner, would the court give this customary clause—in a great number of modern charters—a different interpretation? Do the words "ready to discharge" mean one thing when a certain amount of damage is done and another when another amount? Is it the *quantum* of damage that determines the interpretation of the contract?

The significant thing is that both the charterer and the owner are damaged by the delay, the one having his cargo kept from him and the other his vessel. It is a reasonable interpretation of such an instrument as that at bar, in the absence of a specific agreement by the one or the other to find a ready dock, that where both parties are innocent the loss due to delay from overcrowding in the port should rest where it falls, i. e., on the shoulders of each.

Respectfully submitted,

William Denman,

Proctor for Appellee.

No. 1818

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE WASHINGTON-ALASKA BANK (a Corporation),
Plaintiff in Error,

vs.

C. J. STEWART AND C. M. SHAW,
Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Territory of Alaska, Fourth Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court for the Territory of Alaska, Fourth Division.

No. 1350.

C. J. STEWART,

Plaintiff,

vs.

WASHINGTON-ALASKA BANK (a Corporation),

Defendant.

Complaint.

For a first cause of action plaintiff alleges:

I.

That defendant is and was at all times hereinafter mentioned a corporation duly organized, existing and doing business.

II.

That on, to wit, the 7th day of September, 1907, defendant loaned to plaintiff the sum of $1,300.00, and charged thereafter received and collected from plaintiff interest thereon at the rate of 2% per month.

III.

That plaintiff repaid the principal sum so borrowed as aforesaid, together with the interest as aforesaid; that said payment of principal and interest were made at divers and sundry times between September 23d, 1907, and November 14th, 1907, as follows:

Payments on Principal:		Payments for Interest Due at the Following Dates at said Rate:	
Sep. 23, 1907	$100.00	Interest to Oct. 24, 1907	$34.25
Oct. 8, "	350.00	Interest to Nov. 14, 1907	6.50
Oct. 22, "	150.00		
Oct. 19, "	150.00		
Oct. 31, "	150.00		
Nov. 14, "	400.00		
Total Principal Paid	$1300.00	Total Interest Paid	$40.75

IV.

That said interest so paid was received and collected by defendant of and from plaintiff for the loan and use of the principal money aforesaid, and is in excess of the amount allowed by law and the receiving and collecting thereof by said defendant was illegal and in contravention of section 255, 256 and 257 of Chapter 27, page 408 Carter's Code of Alaska.

And for a second cause of action plaintiff alleges:

I.

That defendant is and was at all times hereinafter mentioned a corporation duly organized, existing and doing business.

II.

That on, to wit, the 13th day of September, 1907, defendant loaned to plaintiff the sum of $2,700.00 and charged and thereafter received and collected from plaintiff interest thereon at the rate of 2% per month.

III.

That plaintiff did repay the principal sum so borrowed as aforesaid, together with interest as aforesaid; that said payment of principal and interest

were made at divers and sundry times between October 29th, 1907, and May 11th, 1908, as follows:

Payments on Principal:		Payments of Interest Due at Following Dates at said Rate:	
Nov. 11, 1907	$200.00	Nov. 14, 1907	$109.07
Oct. 29, "	200.00	Dec. 31, "	69.25
Dec. 10, "	200.00	May 11, "	115.00
Jan. 13, 1908	100.00		
Feb. 3, "	200.00		
Feb. 7, "	500.00		
Feb. 13, "	100.00		
Feb. 15, "	100.00		
Mch. 10, "	150.00		
May 8, "	100.00		
May 11, "	850.00		
Total Principal Paid	$2700.00	Total Interest Paid	$293.32

IV.

That said interest so paid was received and collected by defendant of and from plaintiff for the loan and use of the principal money aforesaid, and is in excess of the amount allowed by law and the receiving and collecting thereof by said defendant was illegal and in contravention of sections 255, 256 and 257 of Chapter 27, Page 408, Carter's Code of Alaska.

And for a third cause of action plaintiff alleges:

I.

That defendant is and was at all times hereinafter mentioned a corporation duly organized, existing and doing business.

II.

That on, to wit, the 13th day of September, 1907, defendant loaned to plaintiff the sum of $5,900.00 and charged and thereafter received and collected

from plaintiff interest thereon at the rate of 2% per Alaska.

III.

That plaintiff repaid the principal sum so borrowed as aforesaid, together with interest as aforesaid; that said payment of principal and interest were made at divers and sundry times between October 13, 1907, and April 12, 1909, as follows:

Payments of Principal:		Payments of Interest Due at Following Dates at said Rate:	
Apr. 10, 1908	$ 50.00	Oct. 13, 1907	$118.00
Apr. 20, "	100.00	Nov. 13, "	118.00
Apr. 22, "	250.00	Dec. 12, "	118.00
Apr. 28, "	200.00	Feb. 10, 1908	236.00
May 1, "	150.00	Apr. 10, "	236.00
May 7, "	75.00	July 31, "	267.84
May 13, "	42.50	Aug. 31, "	27.00
May 18, "	557.50	Sept. 30, "	27.00
May 29, "	600.00	Oct. 31, "	27.00
June 9, "	375.00	Nov. 30, "	27.00
June 10, "	250.00	Dec. 31, "	24.87
June 15, "	225.00	Jan. 30, 1909	14.75
June 19, "	725.00	Feb. 27, "	8.60
June 29, "	300.00	Mch. 31, "	6.00
July 3, "	100.00	Apr. 12, "	2.13
July 7, "	400.00		
July 22, "	150.00		
Dec. 21, "	350.00		
Dec. 24, "	150.00		
Jan. 8, 1909	150.00		
Jan. 23, "	100.00		
Feb. 13, "	300.00		
Apr. 8, "	100.00		
Apr. 12, "	200.00		
Total Principal Paid	$5900.00	Total Interest Paid	$1258.19

IV.

That said interest so paid was received and col-

lected by defendant of and from plaintiff for the loan and use of the principal money aforesaid, and is in excess of the amount allowed by law and the receiving and collecting thereof by said defendant was illegal and in contravention of sections 255, 256 and 257 of Chapter 27, page 408 Carter's Code of Alaska.

And for a fourth cause of action plaintiff alleges:

I.

That defendant is and was at all times hereinafter mentioned a corporation duly organized, existing and doing business.

II.

That on, to wit, the 14th day of September, 1907, defendant loaned to plaintiff the sum of $2,300.00 and charged thereafter received and collected from plaintiff interest thereon at the rate of 2% per month.

III.

That plaintiff repaid the principal sum so borrowed as aforesaid together with interest as aforesaid; that said payment of principal and interest were made at divers and sundry times between November 14th, 1907, and April 13th, 1908, as follows:

Payments on Principal:		Payments of Interest Due at Following Dates at said Rate:	
Nov. 27, 1907	$500.00	Nov. 14, 1907	$92.00
Dec. 21, "	350.00	Nov. 29, "	22.50
Dec. 31, "	100.00	Apr. 13, 1908	76.50
Jan. 10, 1908	500.00		
Feb. 25, "	250.00		
Mch. 2, "	150.00		
Mch. 10, "	225.00		
Mch. 18, "	125.00		
Mch. 23, "	100.00		
Total Principal Paid	$2300.00	Total Interest Paid	$191.00

IV.

That said interest so paid was received and collected by defendant of and from plaintiff for the loan and use of the principal money aforesaid, and is in excess of the amount allowed by law and the receiving and collecting thereof by said defendant was illegal and in contravention of sections 255, 256 and 257 of Chapter 27, page 408, Carter's Code of Alaska.

And for a fifth cause of action plaintiff alleges:

I.

That defendant is and was at all times hereinafter mentioned a corporation duly organized, existing and doing business.

II.

That on, to wit, the 2d day of July, 1909, defendant loaned plaintiff the sum of $1,000.00 and charged and thereafter received and collected from plaintiff interest thereon at the rate of 2% per month.

III.

That plaintiff repaid the principal so borrowed as aforesaid, together with the interest as aforesaid; that said payment of principal and interest were made at divers and sundry times between July 2d, 1909, and July 9th, as follows:

Payments of Principal:		Payments of Interest Due at the Following Dates and at said Rate:	
July 6, 1909	$450.00	July 9, 1909	$3.75
July 9, "	550.00		
Total Principal Paid	$1000.00	Total Interest Paid	$3.75

IV.

That said interest so paid was received and col-

lected by defendant of and from plaintiff for the loan and use of the principal money aforesaid, and is in excess of the amount allowed by law and the receiving and collecting thereof by said defendant was illegal and in contravention of sections 255, 256 and 257 of Chapter 27, page 408, Carter's Code of Alaska.

And for a sixth cause of action plaintiff alleges:

I.

That defendant is and was at all times hereinafter mentioned a corporation duly organized, existing and doing business.

II.

That on, to wit, the 12th day of July, 1909, defendant loaned plaintiff the sum of $3,000.00 and charged and thereafter received and collected from plaintiff interest thereon at the rate of 2% per month.

III.

That plaintiff repaid the principal sum so borrowed as aforesaid, together with interest as aforesaid; that said payments of principal and interest were made at divers and sundry times between July 12th, 1909, and August 9th, 1909, as follows:

Payments of Principal:		Payments of Interest Due at Following Dates at said Rate:	
Aug. 9, 1909	$3000.00	July 31, 1909	$38.00
		Aug. 9, "	18.00
Total Principal Paid	$3000.00	Total Interest Paid	$56.00

IV.

That said interest so paid was received and collected by defendant of and from plaintiff for the loan and use of the principal money aforesaid, and

is in excess of the amount allowed by law and the receiving and collecting thereof by said defendant was illegal and in contravention of sections 255, 256 and 257 of Chapter 27, page 408, Carter's Code of Alaska.

Wherefore, plaintiff demands judgment as follows:

(1)	On the first cause of action, for that being double the amount of interest paid as set out in said cause of action.... ....$	81.50
(2)	On the second cause of action, for that being double the amount of interest paid as set out in said cause of action.....	586.64
(3)	On the third cause of action, for that being double the amount of interest paid as set out in said cause of action..	2516.38
(4)	On the fourth cause of action, for that being double the amount of interest paid as set out in said cause of action....	382.00
(5)	On the fifth cause of action, for that being double the amount of interest paid as set out in said cause of action....	7.50
(6)	On the sixth cause of action, for that being double the amount of interest paid as set out in said cause of action..	112.00
	In all for the sum of.....$	3686.02

And for his costs and disbursements in this behalf incurred.

(Sgd.) R. W. JENNINGS,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

C. J. Stewart, being first duly sworn, on his oath deposes and says: That he is the plaintiff in the within entitled action; that he has read the within complaint, knows the contents thereof and the same are true, as he verily believes.

(Sgd.) C. J. STEWART.

Subscribed and sworn to before me this 22d day of September, 1909.

[Notary Seal]

(Sgd.) E. H. OSBORNE VAUDIN,
Notary Public for Alaska.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart vs. Washington Alaska Bank. Complaint. Filed in the District Court, Territory of Alaska, 4th Division, at 10:20 o'clock A. M., Sep. 22, 1909. E. H. Mack, Clerk. By Geo. F. Gates, Deputy. R. W. Jennings, Attorney for Plaintiff.

[Title of Court and Cause.]

Demurrer [to the Complaint].

Comes now the defendant and demurs to the complaint herein upon the following ground,—that several causes of action have been improperly united.

Defendant further demurs to the alleged first cause of action stated therein upon the ground that it does not state facts sufficient to constitute a cause of action and that the Court has no jurisdiction of the subject of the action.

Defendant further demurs to the alleged second cause of action stated therein upon the ground that it does not state facts sufficient to constitute a cause of action and that the Court has no jurisdiction of the subject of the action.

Defendant further demurs to the alleged third cause of action stated therein upon the ground that it does not state facts sufficient to constitute a cause of action and that the Court has no jurisdiction of the subject of the action.

Defendant further demurs to the alleged fourth cause of action stated therein upon the ground that it does not state facts sufficient to constitute a cause of action and that the Court has no jurisdiction of the subject of the action.

Defendant further demurs to the alleged fifth cause of action stated therein upon the ground that it does not state facts sufficient to constitute a cause of action and that the Court has no jurisdiction of the subject of the action.

Defendant further demurs to the alleged sixth cause of action stated therein upon the ground that it does not state facts sufficient to constitute a cause

of action and that the Court has no jurisdiction of the subject of the action.

Fairbanks, Alaska, October 22, 1909.

WICKERSHAM, HEILIG & RODEN,
H.
Attorneys for Defendant.

Service by copy of the foregoing demurrer admitted this 22d day of October, 1909.

(Sgd.) R. W. JENNINGS,
Attorney for Plaintiff.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart vs. Washington-Alaska Bank. Demurrer. Filed in the District Court, Territory of Alaska, 4th Division. Oct. 22, 1909, E. H. Mack, Clerk. By G. F. Gates, Deputy. Wickersham, Heilig & Roden, Attorneys for Defendant

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[Title of Court and Cause.]

Order Overruling Demurrer [to the Complaint].

Now on this 2d day of November, 1909, the above-entitled cause came on to be heard on defendant's demurrer to plaintiff's complaint. A. R. Heilig appeared in support of the Demurrer and R. W. Jennings, counsel for plaintiff, in opposition thereto. After hearing the arguments of both counsel and examining citations offered, the Court being well advised:

It is ordered: That defendant's demurrer to plaintiff's complaint be and the same is hereby over-

ruled and ten days' time allowed in which to file an Answer.

THOMAS R. LYONS,
District Judge.

[Endorsements]: Entered in Court Journal 9, page 521.

[Title of Court and Cause.]

Answer.

For answer to the first cause of action set forth in the complaint herein defendant alleges: That before the commencement of this action and on or about August 7, 1909, at Fairbanks, Alaska, the plaintiff, by instrument in writing subscribed by him and on said date delivered by him to one C. M. Shaw, duly assigned the subject matter and cause of action set forth in said first cause of action to the said C. M. Shaw, who then was and has been ever since the holder thereof, and was at the time of the commencement of this action and now is the real party in interest.

For answer to the second cause of action set forth in the complaint herein defendant alleges: That before the commencement of this action and on or about August 7, 1909, at Fairbanks, Alaska, the plaintiff, by instrument in writing subscribed by him and on said date delivered by him to one C. M. Shaw, duly assigned the subject matter and cause of action set forth in said second cause of action to the said C. M. Shaw, who then was and has been ever since the holder thereof and was at the time of the commence-

ment of this action and now is the real party in interest.

For answer to the third cause of action set forth in the complaint herein defendant alleges: That before the commencement of this action and on or about August 7th, 1909, at Fairbanks, Alaska, the plaintiff, by instrument in writing subscribed by him and on said date delivered by him to one C. M. Shaw, duly assigned the subject matter and cause of action set forth in said third cause of action to the said C. M. Shaw, who then was and has been ever since the holder thereof and was at the time of the commencement of this action and now is the real party in interest.

For answer to the fourth cause of action set forth in the complaint herein defendant alleges: That before the commencement of this action and on or about August 7, 1909, at Fairbanks, Alaska, the plaintiff, by instrument in writing subscribed by him and on said date delivered by him to one C. M. Shaw, duly assigned the subject matter and cause of action set forth in said fourth cause of action to the said C. M. Shaw, who then was and has been ever since the holder thereof and was at the time of the commencement of this action and now is the real party in interest.

For answer to the fifth cause of action set forth in the complaint herein defendant alleges: That before the commencement of this action and on or about August 7, 1909, at Fairbanks, Alaska, the plaintiff, by instrument in writing subscribed by him and on said date delivered by him to one C. M. Shaw,

duly assigned the subject matter and cause of action set forth in said fifth cause of action to the said C. M. Shaw, who then was and has been ever since the holder thereof and was the time of the commencement of this action and now is the real party in interest.

For answer to the sixth cause of action set forth in the complaint herein defendant alleges; that before the commencement of this action and on or about August 7, 1909, at Fairbanks, Alaska, the plaintiff, by instrument in writing subscribed by him and on said date delivered by him to one C. M. Shaw duly assigned the subject matter and cause of action set forth in said sixth cause of action to the said C. M. Shaw, who then was and has been ever since the holder thereof and was at the time of the commencement of this action and now is the real party in interest.

Wherefore defendant prays that plaintiff take nothing by his action and that the defendant have judgment for his costs and disbursements herein.

Fairbanks, Alaska, Nov. 11, 1909.

WICKERSHAM, HEILIG & RODEN,

H.

Attorneys for Defendant.

Territory of Alaska,
Fourth Division,—ss.

Before me, the undersigned authority, personally appeared G. B. Wesch, who being first duly sworn, deposes and says: That he is the cashier of the Washington-Alaska Bank, the corporation named in the foregoing Answer as defendant; that he has read

the foregoing Answer and that he believes that allegations therein contained to be true.

GEO. B. WESCH.

Subscribed and sworn to before me this 11th day of November, 1909.

[Notary Seal.] ALBERT R. HEILIG,
Notary Public in and for Alaska.

Service by copy of the foregoing Answer admitted this 11th day of November, 1909.

R. W. JENNINGS,
Attorney for Plaintiff.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart vs. Washington-Alaska Bank, a corporation. Answer. Filed in the District Court Territory of Alaska, 4th Division, Nov. 11, 1909. E. H. Mack, Clerk. By Geo. F. Gates, Deputy. Wickersham, Heilig & Roden, Attorney for Defendant.

[Title of Court and Cause.]

Motion and Affidavits [for the Amendment of the Complaint].

United States of America,
Territory of Alaska,
Fourth Division,—ss.

C. J. Stewart, being duly sworn, says: I am the person named as plaintiff in the above-entitle action;

On the 11th day of November, 1909, defendant herein duly filed its Answer to the Complaint in this action, and in said answer defendant alleged

that on the 7th day of August, 1909, affiant, being the plaintiff herein, duly assigned to C. M. Shaw the causes of action set out in the complaint herein, and that C. M. Shaw was, at the time of the commencement of this action and now is, the real party in interest;

Affiant alleges that it is true that on said date he assigned to said C. M. Shaw all and singular the stock in trade, warehouses of any and all character, merchandise, book accounts, bills receivable, notes, drafts and other evidences of indebtedness and also all store fixtures and personal property of every description, and all books of accounts held by affiant, or to which affiant is entitled, or owing to him, and all interest in or to any of the property above mentioned, or in or to any other goods, chattels or personal property of any description belonging to affiant, or in which affiant has any right, title or interest whatever; but affiant alleges that said assignment was made to the said C. M. Shaw for the purpose of enabling him, the said C. M. Shaw, to collect the assets of affiant and to pay the debts of affiant and to pay the surplus remaining, if any, to affiant;

Affiant further alleges that he is in doubt whether or not, in law, said assignment passes to his said assignee, C. M. Shaw, the rights of action for the usury set up in the complaint, and for that reason and in order to remove the possibility that defendant may at any time be subjected to any other suits or action for or on account of the usury complained of in this action, and in so much as the said C. M.

Shaw is willing to be made a party hereto and to be concluded by this action; and because affiant desires to amend his complaint in certain other particulars as hereinafter set forth, affiant moves the Court for leave to amend the complaint herein in the following particulars:

(1) By adding the name of C. M. Shaw as a party plaintiff in this action;

(2) By adding to and making a part of paragraph IV of each cause of action set out in the complaint the following words: "And the charging, collecting and receiving of said interest was done by said defendant in the District of Alaska and with full knowledge that the same was illegal and wrongful";

(3) By adding to each cause of action set out in the complaint a paragraph to be numbered "V" and to read as follows: "That after the payments aforesaid and before the commencement of this action, said C. J. Stewart assigned to C. M. Shaw all and singular the stock in trade, warehouse of any and all character, merchandise, book accounts, bills receivable, notes, drafts and other evidences of indebtedness and also all store fixtures and personal property of every description and all books of account held by the said C. J. Stewart, or to which he was entitled, or which were owing to him and all interest in or to any of the property above mentioned, or in or to any other goods, chattels, or personal property of any description belonging to said C. J. Stewart, or in which the said C. J. Stewart has any right, title or interest whatever, for the purpose of

enabling him, the said C. M. Shaw, to collect the assets and pay the debts of the said C. J. Stewart and to pay the surplus remaining, if any, to the said C. J. Stewart."

This motion is made for the foregoing reasons and is based upon the records and files of this cause and the affidavit of C. M. Shaw hereunto attached.

C. J. STEWART.

Subscribed and sworn to before me this 12th day of November, 1909.

[Notary Seal] E. H. OSBORNE VAUDIN,
Notary Public for Alaska, Residing at Fairbanks, Fourth Division.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

AFFIDAVIT OF C. M. SHAW.

C. M. Shaw, being first duly sworn, on oath deposes and says:

I am the same C. M. Shaw who is mentioned in the foregoing affidavit and motion of C. J. Stewart;

I have read the foregoing affidavit and motion of C. J. Stewart, plaintiff herein, know the contents thereof and believe the same to be true;

If I have any interest either as assignee as aforesaid, or otherwise, in the causes of action, or any of them, mentioned in the complaint, I am willing to be concluded by this action, and I hereby pray to be made a party to said action and to join in the said petition or motion of the said C. J. Stewart.

C. M. SHAW.

Subscribed and sworn to before me this 12th day of November, 1909.

[Notary Public]

E. H. OSBORNE VAUDIN,

Notary Public for Alaska, Residing at Fairbanks, Fourth Division.

NOTICE.

To the Above-named Defendant, and to Messrs. Wickersham, Heilig & Roden, Its Attorneys Herein.

Take notice that on Saturday, November 13th, 1909, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, I will call up for determination by the above-entitled Court, the foregoing matter.

R. W. JENNINGS,

Attorneys for Plaintiff.

Copy received and service accepted.

WICKERSHAM, HEILIG & RODEN,

Attorneys for Defendant.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart vs. Washington-Alaska Bank. Motion and Affidavit. Filed in the District Court, Territory of Alaska, 4th Division. Nov. 12, 1909. E. H. Mack, Clerk. By G. F. Gates, Deputy. R. W. Jennings, Attorney for Plaintiff.

[Title of Court and Cause.]

Defendant's Objections to the Motion of Plaintiff to Amend the Complaint.

Defendant objects to the granting of plaintiffs' motion for leave to amend the complaint herein upon the following grounds:

1. That the manner in which plaintiff seeks to amend his complaint is contrary to law.

2. That it appears from plaintiff's affidavit that he had full knowledge of the facts set forth in his affidavit and motion at the time he filed his original complaint.

3. That it appears from the affidavit and motion that plaintiff has not and did not at the time he commenced this action have the right to bring this action.

4. That it appears from the affidavit and motion that at the time plaintiff commenced this action he was not the real party in interest.

5. That a joinder of plaintiff and C. M. Shaw as coplaintiffs in this action will deprive this defendant of a substantial defense in this action.

6. That the affidavit and motion do not establish a joint cause of action in the plaintiff and C. M. Shaw.

7. That the addition of C. M. Shaw as plaintiff would be in effect a substitution of a person having

an apparent cause of action for the plaintiff who has no cause of action.

Fairbanks, Alaska, November 17, 1909.

WICKERSHAM, HEILIG & RODEN,

H.

Attorneys for Defendant.

Service by copy of the foregoing objections admitted this 17 day of November, 1909.

R. W. JENNINGS,
Attorney for Plaintiff.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart, plaintiff, vs. Washington-Alaska Bank, a Corporation, defendant. Defendant's Objections to Motion of Plaintiff to Amend Complaint. Filed in Open Court Nov. 18, 1909. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy. Wickersham, Heilig & Roden, Attorney for Defendant.

[Title of Court and Cause.]

[Order Sustaining Motion to File an Amended Complaint, etc.]

Now, on this 18th day of November, 1909, arguments having been heard on plaintiff's motion for leave to file an Amended Complaint.

It is ordered: That plaintiff's motion be sustained and that said Amended Complaint may be filed and defendant given five days in which to file his Answer.

THOMAS R. LYONS,
District Judge.

[Endorsements]: Entered in Court Journal No. 9, page 573.

[Title of Court and Cause.]

Amended Complaint Filed by Leave of the Court.

For a first cause of action plaintiffs allege:

I.

That defendant is and was at all times hereinafter mentioned a corporation duly organized, existing and doing business.

II.

That on, to wit, the 7th day of September, 1907, defendant loaned to plaintiff C. J. Stewart the sum of $1300.00, and charged and thereafter received and collected from said plaintiff interest thereon at the rate of 2% per month.

III.

That said plaintiff, C. J. Stewart, repaid the principal sum so borrowed as aforesaid, together with the interest as aforesaid; that said payment of principal and interest were made at divers and sundry times between September 23d, 1907, and November 14th, 1907, as follows:

Payments on Principal:		Payments for Interest Due at the Following Dates at said Rate:	
Sep. 23, 1907	$100.00	Interest to Oct. 24, 1907	$34.25
Oct. 8, "	350.00	Interest to Nov. 14, 1907	6.50
Oct. 22, "	150.00		
Oct. 19, "	150.00		
Oct. 31, "	150.00		
Nov. 14, "	400.00		
Total Principal Paid	$1300.00	Total Interest Paid	$40.75

IV.

That said interest so paid was received and collected by defendant of and from said plaintiff C. J. Stewart for the loan and use of the principal money aforesaid, and is in excess of the amount allowed by law and the receiving and collecting thereof by said defendant was illegal and in contravention of Sections 255, 256 and 257 of Chapter 27, page 408 Carter's Code of Alaska, and the charging, collecting and receiving of said interest was done by said defendant in the District of Alaska and with full knowledge that the same was illegal and wrongful.

V.

That after the payments aforesaid and before the commencement of this action, said C. J. Stewart assigned to the said C. M. Shaw all and singular the stock in trade, warehouses of any and all character, merchandise, book accounts, bills receivable, notes, drafts and other evidences of indebtedness and also all store fixtures and personal property of every description and all books of account held by the said C. J. Stewart, or to which he was entitled, or which were owing to him, and all interest in or to any of the property above mentioned, or in or to any other goods, chattels or personal property of any description belonging to said C. J. Stewart, or in which the said C. J. Stewart has any right, title or interest whatever, for the purpose of enabling him, the said C. M. Shaw, to collect the assets and pay the debts of the said C. J. Stewart and to pay the surplus remaining, if any, to the said C. J. Stewart.

And for a second cause of action plaintiffs allege:

I.

That defendant is and was at all times hereinafter mentioned a corporation duly organized, existing and doing business.

II.

That on, to wit, the 13th day of September, 1907, defendant loaned to plaintiff C. J. Stewart the sum of $2,700.00, and thereafter charged, collected and received from plaintiff aforesaid, interest thereon at the rate of 2% per month.

III.

That said plaintiff C. J. Stewart did repay the principal sum so borrowed as aforesaid, together with interest as aforesaid; that said payments of principal and interest were made at divers and sundry times between October 29th, 1907, and May 11th, 1908, as follows:

Payments on Principal:		Payments of Interest Due at Following Dates at said Rate:	
Nov. 11, 1907	$200.00	Nov. 14, 1907	$109.07
Oct. 29, "	200.00	Dec. 31, "	69.25
Dec. 10, "	200.00	May 11, "	115.00
Jan. 13, 1908	100.00		
Feb. 3, "	200.00		
Feb. 7, "	500.00		
Feb. 13, "	100.00		
Feb. 15, "	100.00		
Mch. 10, "	150.00		
May 8, "	100.00		
May 11, "	850.00		
Total Principal Paid	$2700.00	Total Interest Paid	$293.32

IV.

That said interest so paid was received and collected by defendant of and from said plaintiff C. J.

Stewart for the loan and use of the principal money aforesaid, and is in excess of the amount allowed by law, and the receiving and collecting thereof by said defendant was illegal and in contravention of Sections 255, 256 and 257 of Chapter 27, page 408 Carter's Code of Alaska, and the charging, collecting and receiving of said interest was done by said defendant in the District of Alaska and with full knowledge that the same was illegal and wrongful.

V.

That after the payments aforesaid and before the commencement of this action, said C. J. Stewart assigned to the said C. M. Shaw all and singular the stock in trade, warehouses of any and all character, merchandise, book accounts, bills receivable, notes, drafts and other evidences of indebtedness and also all store fixtures and personal property of every description and all books of account held by the said C. J. Stewart or to which he was entitled, or which were owing to him, and all interest in or to any of the property above mentioned, or in or to any other goods, chattels or personal property of any description belonging to said C. J. Stewart or in which the said C. J. Stewart has any right, title or interest whatever, for the purpose of enabling him, the said C. M. Shaw, to collect the assets and pay the debts of the said C. J. Stewart and to pay the surplus remaining, if any, to the said C. J. Stewart.

And for a third cause of action plaintiffs allege:

I.

That defendant is and was at all times hereinafter mentioned a corporation duly organized, existing and doing business.

II.

That on, to wit, the 13th day of September, 1907, defendant loaned to plaintiff C. J. Stewart the sum of $5,900.00, and thereafter charged, received and collected from said plaintiff interest thereon at the rate of 2% per month.

III.

That said plaintiff C. J. Stewart repaid the principal sum so borrowed as aforesaid, together with interest as aforesaid; that said payment of principal and interest was made at divers and sundry times between October 13th, 1907, and April 12th 1909, as follows:

Payments of Principal:

Apr. 10, 1908	$ 50.00
Apr. 20, "	100.00
Apr. 22, "	250.00
Apr. 28, "	200.00
May 1, "	150.00
May 7, "	75.00
May 13, "	42.50
May 18, "	557.50
May 29, "	600.00
June 9, "	375.00
June 10, "	250.00
June 15, "	225.00
June 19, "	725.00
June 29, "	300.00
July 3, "	100.00
July 7, "	400.00
July 22, "	150.00
Dec. 21, "	350.00
Dec. 24, "	150.00
Jan. 8, 1909	150.00
Jan. 23, "	100.00
Feb. 13, "	300.00
Apr. 8, "	100.00
Apr. 12, "	200.00
Total Principal Paid	$5900.00

Payments of Interest Due at Following Dates at said Rate:

Oct. 13, 1907	$118.00
Nov. 13, "	118.00
Dec. 12, "	118.00
Feb. 10, 1908	236.00
Apr. 10, "	236.00
July 31, "	267.84
Aug. 31, "	27.00
Sept. 30, "	27.00
Oct. 31, "	27.00
Nov. 30, "	27.00
Dec. 31, "	24.87
Jan. 30, 1909	14.75
Feb. 27, "	8.60
Mch. 31, "	6.00
Apr. 12, "	2.13
Total Interest Paid	$1258.19

IV.

That said interest so paid was received and collected by defendant of and from said plaintiff C. J. Stewart for the loan and use of the principal money aforesaid, and is in excess of the amount allowed by law and the receiving and collecting thereof by said defendant was illegal and in contravention of Sections 255, 256 and 257 of Chapter 27, page 408, Carter's Code of Alaska, and the charging, collecting and receiving of said interest was done by said defendant in the District of Alaska, and with the full knowledge that the same was illegal and wrongful.

V.

That after the payments aforesaid and before the commencement of this action, said C. J. Stewart assigned to the said C. M. Shaw all and singular the stock in trade, warehouses of any and all character, merchandise, book accounts, bills receivable, notes, drafts and other evidences of indebtedness and also all store fixtures and personal property of every description and all books of account held by the said C. J. Stewart, or to which he was entitled, or which were owing to him, and all interest in or to any of the property above mentioned, or in or to any other goods, chattels or personal property of any description belonging to said C. J. Stewart or in which the said C. J. Stewart has any right, title or interest whatever, for the purpose of enabling him, the said C. M. Shaw, to collect the assets and pay the debts of the said C. J. Stewart and to pay the surplus remaining, if any, to the said C. J. Stewart.

And for a fourth cause of action plaintiffs allege:

I.

That defendant is and was at all times hereinafter mentioned a corporation duly organized, existing and doing business.

II.

That on, to wit, the 14th day of September, 1907, defendant loaned to plaintiff C. J. Stewart the sum of $2,300.00, and thereafter charged, received and collected from said plaintiff interest thereon at the rate of 2% per month.

III.

That said plaintiff C. J. Stewart repaid the principal sum so borrowed as aforesaid, together with interest as aforesaid; that said payment of principal and interest was made at divers and sundry times between November 14th, 1907, and April 13th, 1908, as follows:

Payments on Principal:		Payments of Interest Due at Following Dates at said Rate:	
Nov. 27, 1907	$500.00	Nov. 14, 1907	$92.00
Dec. 21, "	350.00	Nov. 29, "	22.50
Dec. 31, "	100.00	Apr. 13, 1908	76.50
Jan. 10, 1908	500.00		
Feb. 25, "	250.00		
Mch. 2, "	150.00		
Mch. 10, "	225.00		
Mch. 18, "	125.00		
Mch. 23, "	100.00		
Total Principal Paid	$2300.00	Total Interest Paid	$191.00

IV.

That said interest so paid was received and collected by defendant of and from said plaintiff C. J. Stewart for the loan and use of the principal money aforesaid, and is in excess of the amount allowed by

law and the receiving and collecting thereof by said defendant was illegal and in contravention of Sections 255, 256 and 257, of Chapter 27, page 408, Carter's Code of Alaska, and the charging, collecting and receiving of said interest was done by said defendant in the District of Alaska, and with full knowledge that the same was illegal and wrongful.

V.

That after the payments aforesaid and before the commencement of this action, said C. J. Stewart assigned to the said C. M. Shaw all and singular the stock in trade, warehouses of any and all character, merchandise, book accounts, bills receivable, notes, drafts and other evidences of indebtedness and also all store fixtures and personal property of every description and all books of account held by the said C. J. Stewart, or to which he was entitled, or which were owing to him, and all interest in or to any of the property above mentioned, or in or to any other goods, chattels or personal property of any description belonging to said C. J. Stewart or to which the said C. J. Stewart has any right, title or interest whatever, for the purpose of enabling him, the said C. M. Shaw, to collect the assets and pay the debts of the said C. J. Stewart and to pay the surplus remaining, if any, to the said C. J. Stewart.

And for a fifth cause of action plaintiffs allege:

I.

That defendant is and was at all times hereinafter mentioned a corporation duly organized, existing and doing business.

II.

That on, to wit, the 2d day of July, 1909, defendant loaned to plaintiff C. J. Stewart the sum of $1,000.00, and thereafter charged, received and collected from said plaintiff interest thereon at the rate of 2% per month.

III.

That said plaintiff C. J. Stewart repaid the principal so borrowed as aforesaid, together with the interest as aforesaid; that said payment of principal and interest was made at divers and sundry times between July 2d, 1909, and July 9th, 1909, as follows:

Payments of Principal:		Payments of Interest Due at the Following Dates and at said Rate:	
July 6, 1909	$450.00	July 9, 1909	$3.75
July 9, "	550.00		
Total Principal Paid	$1000.00	Total Interest Paid	$3.75

IV.

That said interest so paid was received and collected by defendant of and from plaintiff C. J. Stewart for the loan and use of the principal money aforesaid, and is in excess of the amount allowed by law and the receiving and collecting thereof, by said defendant was illegal and in contravention of Sections 255, 256 and 257 of Chapter 27, page 408, Carter's Code of Alaska, and the charging, collecting and receiving of said interest was done by said defendant in the District of Alaska, and with full knowledge that the same was illegal and wrongful.

V.

That after the payments aforesaid and before the commencement of this action, said C. J. Stewart

assigned to the said C. W. Shaw all and singular the stock in trade, warehouses of any and all character, merchandise, book accounts, bill receivable, notes, drafts and other evidences of indebtedness and also all store fixtures and personal property of every description and all books of account held by the said C. J. Stewart, or to which he was entitled, or which were owing to him, and all interest in or to any of the property above mentioned, or in or to any other goods, chattels or personal property of any description belonging to said C. J. Stewart or to which the said C. J. Stewart has any right, title or interest whatever, for the purpose of enabling him, the said C. M. Shaw to collect the assets and pay the debts of the said C. J. Stewart and to pay the surplus remaining, if any, to the said C. J. Stewart.

And for the sixth cause of action plaintiff alleges:

I.

That defendant is and was at all times hereinafter mentioned a corporation duly organized, existing and doing business.

II.

That on, to wit, the 12th day of July, 1909, defendant loaned to plaintiff C. J. Stewart the sum of $3,000.00, and thereafter charged, received and collected from said plaintiff interest thereon at the rate of 2% per month.

III.

That said plaintiff C. J. Stewart repaid the principal so borrowed as aforesaid, together with interest as aforesaid; that said payment of principal and

interest was made at divers and sundry times between July 12th, 1909, and August 9th, 1909, as follows:

Payments of Principal:		Payments of Interest Due at Following Dates at said Rate:	
Aug. 9, 1909	$3000.00	July 31, 1909	$38.00
		Aug. 9, "	18.00
Total Principal Paid	$3000.00	Total Interest Paid	$56.00

IV.

That said interest so paid was received and collected by defendant of and from said plaintiff C. J. Stewart for the loan and use of the principal money aforesaid, and is in excess of the amount allowed by law and the receiving and collecting thereof by said defendant was illegal and in contravention of Sections 255, 256 and 257 of Chapter 27, page 408, Carter's Code of Alaska, and the charging, collecting and receiving of said interest was done by said defendant in the District of Alaska, and with full knowledge that the same was illegal and wrongful.

V.

That after the payments aforesaid and before the commencement of this action, said C. J. Stewart assigned to the said C. M. Shaw all and singular the stock in trade, warehouses of any and all character, merchandise, book accounts, bills receivable, notes, drafts and other evidences of indebtedness and also all store fixtures and personal property of every description and all books of account held by the said C. J. Stewart or to which he was entitled, or which were owing to him, and all interest in or to any of the property above mentioned, or in or to any other goods, chattels or personal property of any description belonging to said C. J. Stewart, or to which the

said C. J. Stewart has any right, title or interest whatever, for the purpose of enabling him, the said C. M. Shaw to collect the assets and pay the debts of the said C. J. Stewart and to pay the surplus remaining, if any, to the said C. J. Stewart.

Wherefore plaintiffs demand judgment as follows:

(1)	On the first cause of action, for that being double the amount of interest paid as set out in said cause of action.... ....$	81.50
(2)	On the second cause of action, for that being double the amount of interest paid as set out in said cause of action.....	586.64
(3)	On the third cause of action, for that being double the amount of inetrest paid as set out in said cause of action..	2516.38
(4)	On the fourth cause of action, for that being double the amount of interest paid as set out in said cause of action..	382.00
(5)	On the fifth cause of action, for that being double the amount of interest paid as set out in said cause of action..	7.50
(6)	On the sixth cause of action, for that being double the amount of interest paid as set out in said cause of action..	112.00
	In all for the sum of.....$	3686.02

And for their costs and disbursements in this behalf incurred.

R. W. JENNINGS,
Attorney for Plaintiffs.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

C. J. Stewart, being first duly sworn, on this oath deposes and says: That he is one of the plaintiffs in the within entitled action; that he has read the within amended complaint, knows the contents thereof and the same are true, as he verily believes.

C. J. STEWART.

Subscribed and sworn to before me this 18th day of November, 1909.

[Notary Seal] E. H. OSBORNE VAUDIN,
Notary Public for Alaska, Residing at Fairbanks, Fourth Division.

Service of a copy of the within and foregoing and amended complaint received and accepted this 18 day of November, 1909.

WICKERSHAM, HEILIG & RODEN,
H.
Attorneys for Defendant.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart, Plaintiff, vs. Washington-Alaska Bank, Defendant. Amended Complaint. Filed in the District Court, Territory of Alaska, 4th Division. Nov. 18, 1909. E. H. Mack, Clerk. By G. F. Gates, Deputy. R. W. Jennings, Attorney for Plaintiffs.

[Title of Court and Cause.]

Demurrer to the Amended Complaint.

Comes now the defendant and demurs to the amended complaint herein upon the following ground: That several causes of action have been improperly united.

Defendant further demurs to the alleged first cause of action upon the ground that it does not state facts sufficient to constitute a cause of action; that several causes of action have been improperly united.

Defendant further demurs to the alleged second cause of action upon the ground that it does not state facts sufficient to constitute a cause of action; that several causes of action have been improperly united.

Defendant further demurs to the alleged third cause of action upon the ground that it does not state facts sufficient to constitute a cause of action; that several causes of action have been improperly united.

Defendant further demurs to the alleged fourth cause of action upon the ground that it does not state facts sufficient to constitute a cause of action; that several causes of action have been improperly united.

Defendant further demurs to the alleged fifth cause of action upon the ground that it does not state facts sufficient to constitute a cause of action; that several causes of action have been improperly united.

Defendant further demurs to the alleged sixth cause of action upon the ground that it does not state facts sufficient to constitute a cause of action; that several causes of action have been improperly united.

Fairbanks, Alaska, November 23, 1909.

WICKERSHAM, HEILIG & RODEN,

H.

Attorneys for Defendants.

Service by copy of the foregoing Demurrer admitted this 23rd day of November, 1909.

R. W. JENNINGS,

Attorney for Plaintiffs.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart et al. vs. Washington-Alaska Bank, a Corporation, Defendant. Demurrer to Amended Complaint. Filed in the District Court, Territory of Alaska, 4th Division, Nov. 23, 1909. E. H. Mack, Clerk. By G. F. Gates, Deputy. Wickersham, Heilig & Roden, Attorneys for Defendant.

[Title of Court and Cause.]

Order Overruling Demurrer to the Amended Complaint.

Now on this 26th day of November, 1909, the above-entitled cause was called for a hearing on defendant's Demurrer to the Amended Complaint filed in the above-entitled cause. Arguments of A. R. Heilig, of counsel for defendant, and of R. W. Jen-

nings, counsel for plaintiffs, were heard, at the conclusion of which, the Court being well advised;

It is ordered: That defendant's Demurrer to plaintiffs' Amended Complaint be and the same is now hereby overruled and five days' time is allowed in which defendant may file its Answer.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 9, page 582.

[Title of Court and Cause.]

Answer to the Amended Complaint.

Comes now the defendant and for answer to the first cause of action in the amended complaint herein says:

That neither the plaintiff C. J. Stewart nor the plaintiff C. M. Shaw are the real parties in interest in this action, but that the West Coast Grocery Company, a corporation organized and existing under the laws of the State of Washington with its principal place of business at Tacoma, Washington, is the real party in interest; that at some time prior to the filing of the amended complaint in this cause, the exact time being unknown to the defendant, the plaintiff C. J. Stewart, assigned, transferred and set over to the said West Coast Grocery Company all the right, title and claim to, and interest of the said C. J. Stewart in said first cause of action and the proceeds thereof and any and all such judgment as might be recovered in said action and such money as might be collected thereon; that the said C. J. Stewart is so largely indebted that he is insolvent, and

that all his assets together with the total amount claimed in said amended complaint will not pay all his debts and liabilities to the said West Coast Grocery Company and to his other creditors, and the said C. J. Stewart has no interest whatever in said first cause of action; that this action has been brought at the instance of and on behalf of said West Coast Grocery Company in the name of plaintiffs to avoid the defense; that said cause of action is not assignable and with the distinct understanding and agreement between plaintiffs and said West Coast Grocery Company that said West Coast Grocery Company would pay all costs and expenses and attorney's fees, and said plaintiffs shall not be held in any way responsible for costs, expenses or attorney's fees or any judgment for costs that may be rendered against them in this action, and said West Coast Grocery Company has employed the attorney prosecuting the same at its own expense, and has advanced all necessary costs and expenses for the prosecution thereof, and said West Coast Grocery Company is the exclusive beneficiary in the first cause of action and the only and real party in interest therein. That the plaintiffs herein have no interest whatsoever in the subject matter of said cause of action nor any interest in or to any judgment that may be recovered against the defendant herein, but that the same and the whole thereof is for the benefit of said West Coast Grocery Company.

For answer to the second cause of action in said amended complaint defendant says:

That neither the plaintiff C. J. Stewart nor the plaintiff C. M. Shaw are the real parties in interest

in this action but that the West Coast Grocery Company, a corporation organized and existing under the laws of the State of Washington with its principal place of business at Tacoma, Washington, is the real party in interest; that at some time prior to the filing of the amended complaint in this cause, the exact time being unknown to the defendant, the plaintiff C. J. Stewart, assigned, transferred and set over to the said West Coast Grocery Company all the right, title and claim to, and interest of the said C. J. Stewart in said second cause of action and the proceeds thereof and any and all such judgment as might be recovered in said action and such money as might be collected thereon; that the said C. J. Stewart is so largely indebted that he is insolvent, and that all his assets together with the total amount claimed in said amended complaint will not pay all his debts and liabilities to the said West Coast Grocery Company and to his other creditors, and the said C. J. Stewart has no interest whatever in said first cause of action; that this action has been brought at the instance of and on behalf of said West Coast Grocery Company in the name of plaintiffs to avoid the defense that said cause of action is not assignable, and with the distinct understanding and agreement between plaintiffs and said West Coast Grocery Company that said West Coast Grocery Company would pay all costs and expenses and attorney's fees and said plaintiffs shall not be held in any way responsible for costs, expenses or attorney's fees or any judgment for costs that may be rendered against them in this action, and said West Coast

Grocery Company has employed the attorney prosecuting the same at its own expense, and has advanced all necessary costs and expenses for the prosecution thereof, and said West Coast Grocery Company is the exclusive beneficiary in the second cause of action and the only and real party in interest therein. That the plaintiffs herein have no interest whatsoever in the subject matter of said cause of action nor any interest in or to any judgment that may be recovered against the defendant herein, but that the same and the whole thereof is for the benefit of said West Coast Grocery Company.

For answer to the third cause of action in said amended complaint defendant says:

That neither the plaintiff C. J. Stewart nor the plaintiff C. M. Shaw are the real parties in interest in this action, but that the West Coast Grocery Company, a corporation organized and existing under the laws of the State of Washington with its principal place of business at Tacoma, Washington, is the real party in interest; that at some time prior to the filing of the amended complaint in this cause, the exact time being unknown to the defendant, the plaintiff C. J. Stewart, assigned, transferred and set over to the said West Coast Grocery Company all the right, title and claim to, and interest of the said C. J. Stewart in said third cause of action, and the proceeds thereof, and any and all such judgment as might be recovered in said action and such company as might be collected thereon; that the said C. J. Stewart is so largely indebted that he is insolvent and that all his assets, together

with the total amount claimed in said amended complaint, will not pay all the debts and liabilities to the said West Coast Grocery Company and to his other creditors, and the said C. J. Stewart has no interest whatever in said third cause of action; that this action has been brought at the instance of and on behalf of said West Coast Grocery Company in the name of plaintiffs to avoid the defense that said cause of action is not assignable and with the distinct understanding and agreement between plaintiffs and said West Coast Grocery Company that said West Coast Grocery Company would pay all costs and expenses and attorney's fees, and said plaintiffs shall not be held in any way responsible for costs, expenses or attorney's fees or any judgment for costs that may be rendered against them in this action, and said West Coast Grocery Company has employed the attorney prosecuting the same at its own expense and has advanced all necessary costs and expenses for the prosecution thereof, and said West Coast Grocery Company is the exclusive beneficiary in the said third cause of action and the only and real party in interest therein. That the plaintiffs herein have no interest whatsoever in the subject matter of said cause of action nor any interest in or to any judgment that may be recovered against the defendant herein, but that the same and the whole thereof is for the benefit of said West Coast Grocery Company.

For answer to the fourth cause of action in said amended complaint, defendant says:

That neither the plaintiff C. J. Stewart nor the

plaintiff C. M. Shaw are the real parties in interest in this action but that the West Coast Grocery Company, a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Tacoma, Washington, is the real party in interest; that at some time prior to the filing of the amended complaint in this cause, the exact time being unknown to the defendant, the plaintiff C. J. Stewart, assigned, transferred and set over to the said West Coast Grocery Company all the right, title and claim to, and interest of the said C. J. Stewart in said fourth cause of action and the proceeds thereof and any and all such judgment as might be recovered in said action and such money as might be collected thereon; that the said C. J. Stewart is so largely indebted that he is insolvent and that all his assets, together with the total amount claimed in said amended complaint, will not pay all his debts and liabilities to the said West Coast Grocery Company and to his other creditors, and the said C. J. Stewart has no interest whatever in said fourth cause of action; that this action has been brought at the instance of and on behalf of said West Coast Grocery Company in the name of plaintiffs to avoid the defense that said cause of action is not assignable and with the distinct understanding and agreement between plaintiffs and said West Coast Grocery Company that said West Coast Grocery Company would pay all costs and expenses and attorney's fees and said plaintiffs shall not be held in any way responsible for costs, expenses or attorney's fees or any judgment for costs that may be

rendered against him in this action, and said West Coast Grocery Company has employed the attorney prosecuting the same at its own expense and has advanced all necessary costs and expenses for the prosecution thereof and said West Coast Grocery Company is the exclusive beneficiary in the said fourth cause of action and the only and real party in interest therein. That the plaintiffs herein have no interest whatsoever in the subject matter of said cause of action nor any interest in or to any judgment that may be recovered against the defendant herein, and that the same and the whole thereof is for the benefit of said West Coast Grocery Company.

For answer to the fifth cause of action in said amended complaint defendant says:

That neither the plaintiff C. J. Stewart nor the plaintiff C. M. Shaw are the real parties in interest in this action, but that the West Coast Grocery Company, a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Tacoma, Washington, is the real party in interest; that at some time prior to the filing of the amended complaint in this cause, the exact time being unknown to the defendant, the plaintiff C. J. Stewart, assigned, transferred and set over to the said West Coast Grocery Company all the right, title and claim to, and interest of the said C. J. Stewart in said first cause of action and the proceeds thereof and any and all such judgment as might be recovered in said action and such money as might be collected thereon; that the said C. J. Stewart is so largely indebted that he is

insolvent and that all his assets, together with the total amount claimed in said amended complaint, will not pay all his debts and liabilities to the said West Coast Grocery Company and to his other creditors, and the said C. J. Stewart has no interest whatever in said fifth cause of action; that this action has been brought at the instance of and on behalf of said West Coast Grocery Company in the name of plaintiffs to avoid the defense that said cause of action is not assignable and with the distinct understanding and agreement between plaintiffs and said West Coast Grocery Company that said West Coast Grocery Company would pay all costs and expenses and attorney's fees and said plaintiffs shall not be held in any way responsible for costs, expenses or attorney's fees or any judgment for costs that may be rendered against them in this action, and said West Coast Grocery Company has employed the attorney prosecuting the same at its own expense and has advanced all necessary costs and expenses for the prosecution thereof, and said West Coast Grocery Company is the exclusive beneficiary in the fifth cause of action and the only and real party in interest therein. That the plaintiffs herein have no interest whatsoever in the subject matter of said cause of action nor any interest in or to any judgment that may be recovered against the defendant herein, but that the same and the whole thereof is for the benefit of said West Coast Grocery Company.

For answer to the sixth cause of action in said amended complaint defendant says:

That neither the plaintiff C. J. Stewart nor the

plaintiff C. M. Shaw are the real parties in interest in this action but that the West Coast Grocery Company, a corporation organized and existing under the laws of the State of Washington with its principal place of business at Tacoma, Washington, is the real party in interest; that at some time prior to the filing of the amended complaint in this action, the exact time being unknown to the defendant, the plaintiff C. J. Stewart, assigned, transferred and set over to the said West Coast Grocery Company, all the right title and claim to, and interest of the said C. J. Stewart in said sixth cause of action and the proceeds thereof and any and all such judgment as might be recovered in said action and such money as might be collected thereon; that the said C. J. Stewart is so largely indebted that he is insolvent and that all his assets, together with the total amount claimed in said amended complaint, will not pay all his debts and liabilities to the said West Coast Grocery Company and to his other creditors, and the said C. J. Stewart has no interest whatever in said first cause of action; that this action has been brought at the instance of and on behalf of said West Coast Grocery Company in the name of plaintiffs to avoid the defense that said cause of action is not assignable and with the distinct understanding and agreement between plaintiff, and said West Coast Grocery Company that said West Coast Grocery Company would pay all costs and expenses and attorney's fees and said plaintiffs shall not be held in any way responsible for costs, expenses or attorney's fees or any judgment

for costs that may be rendered against them in this action, and said West Coast Grocery Company has employed the attorney prosecuting the same at its own expense and has advanced all necessary costs and expenses for the prosecution thereof and said West Coast Grocery Company is the exclusive beneficiary in the said sixth cause of action and the only and real party in interest therein. That the plaintiffs herein have no interest whatsoever in the subject matter of said cause of action nor any interest in or to any judgment that may be rendered against the defendant herein, and that the same and the whole thereof is for the benefit of said West Coast Grocery Company.

Wherefore defendant prays that plaintiffs take nothing by their action and that the defendant have judgment for its costs and disbursements herein.

Fairbanks, Alaska, December 2, 1909.

WICKERSHAM, HEILIG & RODEN,

H.

Attorneys for Defendant.

Territory of Alaska,
Fairbanks Precinct,—ss.

Before me, the undersigned authority, personally appeared G. B. Wesch, who, being first duly sworn, deposes and says: That he is the cashier of the Washington-Alaska Bank, the corporation named in the foregoing answer as defendant; that he has read the foregoing answer and that he believes the allegations therein contained to be true.

GEO. B. WESCH.

Subscribed and sworn to before me this 2d day of December, 1909.

[Seal] ALBERT R. HEILIG,
Notary Public in and for Alaska.

Service by copy of the foregoing answer to amended complaint admitted this 2d day of December, 1909.

R. W. JENNINGS,
Attorney for Plaintiffs.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart and C. M. Shaw, Plaintiff, vs. Washington-Alaska Bank, a Corporation, Defendant. Answer to Amended Complaint. Filed in the District Court, Territory of Alaska, 4th Div. Dec. 2, 1909. E. H. Mack, Clerk. By E. A. Henderson, Deputy. James Wickersham, Heilig & Roden, Attorneys for Defendant.

[Title of Court and Cause.]

Motion to Strike Answer and for Judgment.

Comes now plaintiffs in the above-entitled cause and move the Court to strike from the records and files of this cause to Answer filed herein, on the 2d day of December, 1909, to the Amended Complaint, and to render Judgment herein in favor of plaintiffs and against defendants, for the amount prayed for in said amended complaint, for the reason that said answer is sham and frivolous, and raises no issue and is not interposed in good faith, but is interposed solely for the purpose of delay, and for the purpose

of harassing, vexing and annoying plaintiffs, and delaying the entry of Judgment to which defendant is well aware plaintiffs are entitled.

This motion is based on the records and files of this case, and on the affidavit of C. J. Stewart, plaintiff herein.

R. W. JENNINGS,
Attorney for Plaintiffs.

[Endorsements]: Filed in the District Court, Territory of Alaska, Fourth Division. December 3, 1909. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Affidavit of C. J. Stewart.

United States of America,
Territory of Alaska,—ss.

C. J. Stewart, being sworn, says: I am one of the plaintiffs in this action. Said action was begun by me as sole plaintiff, by filing a complaint and issuing summons herein on September 22, 1909. Said summons was served on defendant on same day. Said action was and is one to recover usurious interest paid by me to defendant at divers and sundry times and on six separate notes. In order to avoid the annoyance and expense of a separate action for each payment of the several items of interest, the several causes of action were joined and one action for each payment of the several items of interest, the several causes of action were joined and one action brought for all said payments.

Defendant made no appearance whatsoever in said action until 3:30 o'clock P. M. of October 22, 1909; at which time it filed a demurrer alleging as grounds thereof:

1. That this court had no jurisdiction of the subject matter.

2. That the complaint did not state facts sufficient to constitute a cause of action.

3. That two or more causes of action were improperly united.

Said demurrer came on to be heard on November 2, 1909, and at that time was by this Court overruled. Defendant then asked for twenty days in which to answer, alleging that it wished to hear from its manager, W. H. Parsons, who was in the States. The Court refused to allow twenty days in which to answer but did allow ten days in which to answer. On the last of the ten days so allowed, defendant filed its answer, which said answer denied none of the allegations of the complaint, but alleged only that C. M. Shaw was the real party in interest by virtue of an assignment of the cause of action from me to said Shaw, alleged to have been made August 7, 1909.

On the service on me, on November 11, 1909, of said answer, I immediately filed my affidavit herein and served it upon defendant and in said affidavit I alleged that on said August 7, 1909, I had made an assignment of all my property to said Shaw for the benefit of my creditors and that I was in doubt whether said assignment was effectual in law to convey said cause of action. And said affidavit was also an application to this court that the name of said

Shaw be added as a party plaintiff, and attached to said affidavit and application was the statement of said Shaw that he was willing to be concluded by the judgment in this action, and application of said Shaw to be made a party plaintiff.

Said application or petitions came on to be heard by this court on the 18th day of November, 1909, and defendant strenuously resisted same, but this Court allowed an amended complaint to be filed in which said Shaw was added as a party plaintiff and defendant was allowed five days from the date of service upon it of said amended complaint wherein to plead to said amended complaint.

Said defendant, on the last of said five days, filed a demurrer to said amended complaint on the same grounds as those urged against the original complaint, notwithstanding the fact that said amended complaint in no wise substantially differed from the original complaint.

Said demurrer came on to be heard on the 26th day of November, 1909, and at said hearing defendant did not even argue same, and said demurrer was by this court promptly overruled. Defendant then asked for and obtained leave to file an answer within five days.

On the day after the last of said five days, defendant filed its answer to said amended complaint wherein it alleged that neither myself nor said Shaw was the real party in interest, but that the West Coast Grocery Company, one of my creditors, is the real party in interest.

In neither of said answers is any of the facts al-

leged in the complaint denied. I have in my possession the original notes which I executed for the money mentioned in the complaint. Said notes on their face state that they bear interest at the rate of two per cent per month and on the reverse side of said notes is noted the payments of principal and interest—all in the handwriting of defendant's proper officer or the official stamp of the said defendant.

Defendant cannot deny any of the matters and things alleged in said complaint, or said amended complaint, without committing rank perjury and rendering the maker of said denial amenable to the criminal law. Defendant is well aware of all the facts in this affidavit mentioned. I am informed that said defendant is negotiating a sale of all its property and is seeking to effect same before I can obtain a judgment. That a judgment obtained against defendant after said transfer is actually accomplished would be worthless for any purpose and defendant raises these sham, feigned and frivolous defenses for the sole purpose of precipitating an issue which will necessitate a trial and defer the rendition of a judgment until after such transfer be effected.

Said answer to said amended complaint is sham, in that same is false, as shown by the record in this cause; and is frivolous and that it presents no real issue and the facts therein set forth cannot be so stated as to raise a real issue; and said answer is interposed in bad faith and solely for the purpose of

delay. Said answer is false in each and every particular save the allegation of my insolvency.

C. J. STEWART.

Subscribed and sworn to before me this 3d day of December, 1909.

[Notary Seal] ESTELLE FITT,
Notary Public in and for the Territory of Alaska.

To Washington-Alaska Bank, the Above-named Defendant, and to Messrs. Wickersham, Heilig & Roden, Its Attorneys:

Take notice that on Saturday, December 4, 1909, at the courthouse in Fairbanks, and at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, I will call up for determination by the Court the foregoing motion.

R. W. JENNINGS,
Attorney for Plaintiffs.

Copy received and service accepted, this 3d day of December, 1909.

WICKERSHAM, HEILIG & RODEN,
Attorneys for Defendant.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart and C. M. Shaw vs. Washington Alaska Bank. Motion to Strike and for Judgment, and Affidavit of C. J. Stewart. Original. Filed in the District Court, Territory of Alaska, 4th Division, December 3, 1909. E. H. Mack, Clerk. By G. F. Gates, Deputy. R. W. Jennings, Attorney for Plaintiffs.

[Title of Court and Cause.]

Motion to Strike Affidavit of C. J. Stewart.

Comes now the defendant and moves the Court to strike from the records and files in this case the affidavit of C. J. Stewart attached to the motion of plaintiffs to strike from the records and files in this case the answer of the defendant to the amended complaint herein, upon the grounds that the said affidavit cannot properly be considered by the Court upon said motion, and that said affidavit is not a proper and legal part of said motion, and that the filing thereof is an attempt to bring about a termination of the merits of the issue made by the answer of the defendant to the amended complaint herein upon the affidavit of the said C. J. Stewart.

Fairbanks, Alaska, December 8, 1909.

WICKERSHAM, HEILIG & RODEN,
H.
Attorneys for Defendant.

Service by copy of the foregoing motion admitted this 8 day of December, 1909.

R. W. JENNINGS,
Attorney for Plaintiffs.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart and C. M. Shaw, Plaintiff, vs. Washington Bank, Defendant. Motion to Strike Affidavit of C. J. Stewart. Filed in Open Court Dec. 8, 1909. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy. James Wickersham, Heilig & Roden, Attorneys for Defendant.

[Title of Court and Cause.]

Order Overruling Motion for Leave to Amend Answer to Amended Complaint.

This action being before the Court upon motion of plaintiffs to strike from the records and files in this cause the answer filed herein on December 2, 1909, and for judgment, the defendant, in open court, while the Court is ruling on said motion, moves the court for leave to file an amended answer to the amended complaint and to amend its answer to the amended complaint in this particular, to wit: By adding to each answer to the six several causes of action set forth in the amended complaint the following allegation: "That said C. M. Shaw is and at all times mentioned in said amended complaint was the agent and employee of said West Coast Grocery Company."

Which motion the Court, upon due consideration, overruled, to which ruling of the Court the defendant duly excepted and an exception is allowed.

THOMAS R. LYONS,
District Judge.

[Endorsements]: Entered in Court Journal No. 9, page 636.

[Title of Court and Cause.]

Order Overruling Defendant's Motion to Strike Affidavit of C. J. Stewart.

Now, on this 15th day of December, 1909, the Court having heretofore heard arguments of counsel and

having had under advisement defendant's motion to strike the affidavit of C. J. Stewart, attached to plaintiff's motion to strike defendant's answer to amended complaint, filed by plaintiffs herein, and being now well advised,

It is ordered that defendant's said motion to strike the affidavit of C. J. Stewart be and the same is now hereby denied and overruled. To which ruling defendant excepts and the exception is allowed.

THOMAS R. LYONS,
District Judge.

[Endorsements]: Entered in Court Journal No. 9, page 636.

[Title of Court and Cause.]

Order Sustaining Plaintiff's Motion to Strike Defendant's Answer and for Judgment.

Now, on this 15th day of December, 1909, arguments having heretofore been heard, and the Court having had under advisement plaintiff's motion to strike defendant's Answer to the amended Complaint herein, and also plaintiff's motion for Judgment embodied therein, and being now well advised:

It is ordered: That plaintiff's said motion to strike defendant's answer and for Judgment be and the same is now hereby sustained. To which ruling defendant excepts, and the exception is allowed.

THOMAS R. LYONS,
District Judge.

[Endorsements]: Entered in Court Journal No. 9, at page 636.

In the District Court for the Territory of Alaska, Fourth Judicial Division.

No. 1350.

C. J. STEWART and C. M. SHAW,

Plaintiffs,

vs.

WASHINGTON-ALASKA BANK (a Corporation),

Defendant.

Judgment.

This cause came on to be heard on the motion of plaintiffs that the answer of the defendant to the amended complaint herein be stricken out as sham and frivolous and for judgment against defendant as prayed for in the amended complaint; the matter was fully argued by the attorneys for respective parties hereto, and the Court took the same under advisement; and now on this 15th day of December, 1909, the Court being fully advised in the premises, renders its decision and doth sustain said motion, which said decision is made in open court and in the presence of the attorneys for both parties hereto.

Wherefore, by reason of the law and the premises, it is

ORDERED, ADJUDGED AND DECREED: That plaintiffs do have and recover of and from the defendant the sum of Three Thousand Six Hundred Eighty-six and 2/100 Dollars ($3,686.02) besides

their costs and disbursements herein to be taxed. Defendant excepts.

Done in open court at Fairbanks, Alaska, December 15, 1909.

By the Court,
THOMAS R. LYONS,
Judge.

Entered in Court Journal No. 9, page 640.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. Stewart et al. vs. Washington-Alaska Bank. Judgment.

[Title of Court and Cause.]

Assignment of Errors.

Comes now the defendant in the above-entitled cause, being the plaintiff in error, and assigns the following errors as having been committed by the above-entitled court on the trial of the above-entitled action, which errors the said defendant intends to and does reply upon on its writ of error to be presented to the United States Circuit Court of Appeals for the Ninth Circuit.

1. The Court erred in overruling defendant's Demurrer to the original complaint.

2. The Court erred in overruling defendant's objection to the motion of plaintiff to amend his original complaint.

3. The Court erred in allowing the filing of plaintiff's amended complaint.

4. The Court erred in overruling defendant's demurrer to the Amended Complaint.

5. The court erred in sustaining plaintiff's motion to strike from the records and files defendant's answer to the amended complaint.

6. The Court erred in overruling defendant's motion to strike from the records and files the affidavit of C. J. Stewart attached to plaintiff's motion to strike defendant's Amended Answer.

7. The Court erred in overruling defendant's motion to amend its answer to the amended complaint.

8. The Court erred in sustaining plaintiff's motion for judgment.

9. The Court erred in making and entering judgment in favor of plaintiffs and against the defendant in the sum of $3,686.02, and their costs and disbursements.

Wherefore the defendant prays that the judgment in the above-entitled action may be reversed and that it be restored to all things which it has lost thereby.

WICKERSHAM, HEILIG & RODEN,

H.

Attorneys for Defendant.

Service accepted December 29, 1909.

R. W. JENNINGS,

Attorney for Plaintiffs.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart et al., Plaintiffs, vs. Washington-Alaska Bank, Defendant. Assignment of Error. Filed in the District Court, Territory of Alaska, 4th Division. Dec. 29, 1909. E. H. Mack, Clerk. By E. A. Henderson, Deputy. Wickersham, Heilig & Roden, Attorneys for Defendant.

[Title of Court and Cause.]

Petition for Writ of Error.

The Washington-Alaska Bank, defendant in the above-entitled cause, feeling itself aggrieved by the judgment made and entered in the above-entitled court and cause on the 15th day of December, 1909, comes now by Messrs. Wickersham, Heilig & Roden, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of such writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

WICKERSHAM, HEILIG & RODEN,

H.

Attorneys for Defendant.

Service of the foregoing petition for writ of error and order is hereby admitted at Fairbanks, Alaska, this 29th day of December, 1909.

R. W. JENNINGS,

Attorney for Plaintiffs.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart et al., Plaintiff, vs. Washington-Alaska Bank, Defendant. Petition for Writ of Error. Filed in the District Court Territory of Alaska, 4th Division. Dec. 29, 1909. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Order Allowing Writ of Error, etc.

Upon motion of Messrs. Wickersham, Heilig & Roden, attorneys for the defendant, and the filing of a petition for a writ of error and assignment of errors,

It is ordered: That a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby is fixed at Five Thousand Dollars.

Dated December 29, 1909.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 9, page 658.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart et al., Plaintiff, vs. Washington-Alaska Bank, Defendant. Order Allowing Writ of Error, etc. Filed in the District Court Territory of Alaska, 4th Division. Dec. 29, 1909. E. H. Mack, Clerk.

By E. A. Henderson, Deputy. Wickersham, Heilig & Roden, Attorneys for Defendant.

[Title of Court and Cause.]

Writ of Error [Original].

United States of America,—ss.

The President of the United States of America, to the Honorable THOMAS R. LYONS, Judge of the United States District Court for the Fourth Division of the Territory of Alaska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court for the Fourth Division of the Territory of Alaska, before you, between C. J. Stewart and C. M. Shaw, plaintiffs, and Washington-Alaska Bank, defendants, a manifest error has happened to the great prejudice and damage of the said defendant, said Washington-Alaska Bank, as is said and appears by the petition herein.

We, being willing that error, if any hath been made, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, together with this writ, so as to have the same at the said place in said circuit on the 28th day of January, 1910, that the records and proceedings

aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this the 29th day of December, 1909.

[Seal] E. H. MACK,

Clerk of the District Court for the Fourth Division of the Territory of Alaska.

Allowed this 29th day of December, 1909.

THOMAS R. LYONS,

Judge of the District Court for the Fourth Division of the District of Alaska.

Service of the within and foregoing writ of error by receipt of a copy thereof is hereby admitted at Fairbanks, Alaska, this 29th day of December, 1909.

R. W. JENNINGS,
Attorney for Plaintiffs.

[Endorsed]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart et al., Plaintiffs, vs. Washington-Alaska Bank, Defendant. Writ of Error.

[Title of Court and Cause.]

Order Relative to Supersedeas Bond on Writ of Error.

The defendant, Washington-Alaska Bank, having this day filed its petition for a writ of error from the judgment made and entered herein to the United

States Circuit Court of Appeals, for the Ninth Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings of this court be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals for the Ninth Circuit, and said petition having this day been allowed.

Now, therefore, it is ordered: That upon the defendant above named filing with the clerk of this Court a good and sufficient bond in the sum of Five Thousand Dollars, to the effect that if the said defendant and plaintiff in error shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its plea good then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by this Court —that all further proceedings in this court be and they are hereby suspended and stayed until the determination of said writ of error by the said Circuit Court of Appeals.

Dated this 29th day of December, 1909.

THOMAS R. LYONS,
District Judge.

[Endorsements]: Entered in Court Journal No. 9, page 658. No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart et al., Plaintiffs, vs. Washington-Alaska Bank, Defendant. Order Relative to Supersedeas Bond on Writ of Error. Filed in the District Court,

Territory of Alaska, 4th Division. Dec. 29, 1909. E. H. Mack, Clerk. By E. A. Henderson, Deputy. Wickersham, Heilig & Roden, Attorneys for Defendants.

[Title of Court and Cause.]

Bond on Writ of Error.

Know All Men by These Presents: That we, the Washington-Alaska Bank, a corporation, as principal, and F. S. McFarline and R. C. Wood, both residents of the town of Fairbanks, Territory of Alaska, as sureties, are held and firmly bound unto C. J. Stewart and C. M. Shaw, the plaintiffs above named, in the sum of Five Thousand Dollars, to be paid to the plaintiffs, their executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, and each of us, and our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our hands and seals and dated this 29th day of December, One Thousand Nine Hundred and Nine.

Whereas, on the 15th day of December, 1909, in the District Court in and for the Fourth Division of the Territory of Alaska, in a suit pending in said court between C. J. Stewart and C. M. Shaw, as plaintiffs, and the Washington-Alaska Bank, as defendant, a judgment was rendered against the said Washington-Alaska Bank, defendant, and said defendant has sued out a writ of error from said District Court to

the Circuit Court of Appeals for the Ninth Circuit to reverse said judgment, and has procured the issuance of a citation directed to the said C. J. Stewart and C. M. Shaw, citing and admonishing them to be and appear at a session of said United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, on the 28th day of January, 1910; and

Whereas plaintiff in error desires a stay of execution in the above-entitled action pending the above appeal.

Now, therefore, the condition of the above obligation is such that if the above-named defendant Washington-Alaska Bank shall prosecute said writ of error to effect and answer and pay all judgments, damages, and costs if it fail to make its plea good then this obligation shall be void; otherwise to remain in full force and virtue.

WASHINGTON-ALASKA BANK. [Seal]
By GEO. B. WESCH,
Cashier.
F. S. McFARLINE. [Seal]
R. C. WOOD. [Seal]

Sealed and delivered in the presence of:
H. H. REEVES.
A. F. HERPICK, Jr.

United States of America,
Territory of Alaska,—ss.

F. S. McFarline and R. C. Wood being first duly sworn, each for himself and not one for the other, doth depose and say: That he is one of the sureties

on the within and foregoing appeal and supersedeas bond; that he is a resident within the District of Alaska; that he is not an attorney or counselor at law, marshal, deputy marshal, commissioner, clerk of the court, or other officer of any court, and that he is worth the amount specified in the foregoing bond over and above all debts and liabilities and exclusive of property exempt from execution.

F. S. McFARLINE.
R. C. WOOD.

Subscribed and sworn to before me this 29th day of December, 1909.

[Notary Seal] ALBERT R. HEILIG,
Notary Public in and for the District of Alaska.

The above bond is hereby approved this 29th day of December, 1909.

THOMAS R. LYONS,
District Judge.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart et al., Plaintiffs, vs. Washington-Alaska Bank, Defendant. Bond on Writ of Error. Filed in the District Court, Territory of Alaska, 4th Division, Dec. 29, 1909. E. H. Mack, Clerk. By E. A. Henderson, Deputy. Wickersham, Heilig & Roden, Attorney for Defendant.

[Title of Court and Cause.]

Citation [on Writ of Error (Original)].

United States of America,—ss.

The President of the United States of America to C. J. Stewart, C. M. Shaw, and to R. W. Jennings, Their Attorney, Greeting:

You are hereby cited and admonished to appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ pursuant to a writ of error filed in the office of the clerk of the District Court for the Fourth Division of the Territory of Alaska, wherein C. J. Stewart and C. M. Shaw are defendants in error and the Washington-Alaska Bank is plaintiff in error, and show cause if any there be why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in error in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 29th day of December, 1909.

THOMAS R. LYONS,

District Judge, Presiding in the District Court for the Fourth Division of the Territory of Alaska.

Service of the foregoing citation is hereby admitted by receipt of a copy thereof this 29th day of December, 1909.

R. W. JENNINGS,

Attorney for Plaintiffs.

[Endorsed]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart et al., Plaintiffs, vs. Washington-Alaska Bank, Defendant. Citation.

[Title of Court and Cause.]

Order Extending Time to Perfect Appeal.

On this 29th day of December, 1909, the above-entitled cause came on to be heard before the Judge of the above-entitled court upon the application of the defendant herein for an order extending the return day, the parties appearing by their respective attorneys, and it appearing to the Court that it is necessary, owing to the great distance from Fairbanks to San Francisco, California, and the slow and uncertain communication between said point, that an order extending the time in which to docket said cause and to file the record therein by the clerk of the United States Circuit Court of Appeals for the Ninth Circuit should be extended until the 21 day of February, 1910, and the Court being fully advised in the premises, and believing good cause exists therefor—

It is hereby ordered that the time within which the said appellant shall perfect said case on appeal and file the record thereof and docket said cause with the clerk of said Circuit Court of Appeals be and the same is hereby enlarged and extended to and including the 21 day of February, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 9, page 658.

[Endorsed]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart et al., Plaintiffs, vs. Washington-Alaska Bank, Defendant. Order Extending Time to Perfect Appeal. Filed in the District Court, Territory of Alaska, 4th Div., Dec. 29, 1909. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Stipulation Relative to Printing of Record.

It is hereby stipulated and agreed that in the printing of the record herein for the consideration of the Circuit Court of Appeals that the title of the court and cause in full on all papers shall be omitted, excepting the first page, inserting in place and stead thereof "Title of Court and Cause."

Dated this 29th day of December, 1909.

R. W. JENNINGS,
Attorney for Plaintiffs.

WICKERSHAM, HEILIG & RODEN,
H.
Attorneys for Defendant.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart et al., Plaintiffs, vs. Washington-Alaska Bank, Defendant. Stipulation Relative to Printing of Record. Filed in the District Court, Territory of Alaska, 4th Div., Dec. 29, 1909. E. H. Mack, Clerk. By E. A. Henderson, Deputy. James Wickersham, Heilig & Roden, Attorneys for Defendant.

[Title of Court and Cause.]

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare the transcript or record in this case to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the writ of error heretofore perfected to said court, and include in said transcript the papers included in the stipulation entered into between the plaintiffs and defendant by and through their respective attorneys in this case, namely:

1. Original complaint;
2. Demurrer to original complaint;
3. Order overruling demurrer to original complaint;
4. Answer to original complaint;

4½. Motion and affidavit for leave to file amended complaint.

5. Objection to motion of plaintiffs to file amended complaint;
6. Order allowing filing of amended complaint;
7. Amended complaint;
8. Demurrer to amended complaint;
9. Order overruling demurrer to amended complaint;
10. Answer to amended complaint;
11. Motion to strike defendant's answer from the records and files and for judgment with affidavit of C. J. Stewart and C. M. Shaw, attached;
12. Defendant's motion to strike affidavit of C. J. Stewart attached to plaintiff's motion to strike;

13. Order overruling defendant's motion for leave to amend answer to amended complaint;

14. Order overruling defendant's motion to strike affidavit of C. J. Stewart;

15. Order sustaining plaintiffs' motion to strike defendant's answer and for judgment;

16. Judgment;

17. Assignment of errors;

18. Petition for writ of error;

19. Order allowing writ of error;

20. Bond;

21. Citation and admission of service thereon;

22. Order of supersedeas;

23. Order extending return day;

24. Stipulation for printing of transcript;

25. Praecipe for transcript;

26. Stipulation as to making up of record.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, on or before the 21 day of February, 1910.

WICKERSHAM, HEILIG & RODEN,

H.

Attorneys for Plaintiff in Error.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart et al., Plaintiffs, vs. Washington-Alaska Bank, Defendant. Praecipe for Transcript of Record. Filed in the District Court, Territory of

Alaska, 4th Div., Dec. 29, 1909. E. H. Mack, Clerk. By E. A. Henderson, Deputy. James Wickersham, Heilig & Roden, Attorneys for Defendant.

[Title of Court and Cause.]

Stipulation as to Making up Record.

It is hereby stipulated between the plaintiffs and defendant by and through their respective attorneys that the transcript of the record on appeal in the above-entitled cause shall be made up of the following papers:

1. The original complaint;
2. Demurrer to original complaint;
3. Order overruling demurrer to original complaint;
4. Answer to original complaint;
5. Motion and affidavit for leave to file amended complaint;
6. Defendant's objections to motion to file amended complaint;
7. Order allowing filing of amended complaint;
8. Amended complaint;
9. Demurrer to amended complaint;
10. Order overruling demurrer to amended complaint;
11. Answer to amended complaint;
12. Motion to strike defendant's answer from the records and files and for judgment and affidavit of C. J. Stewart and C. M. Shaw, attached;
13. Defendant's motion to strike affidavit of C. J. Stewart attached to plaintiff's motion to strike;

14. Order overruling defendant's motion for leave to amend answer to amended complaint;

15. Order overruling defendant's motion to strike affidavit of C. J. Stewart;

16. Order sustaining plaintiff's motion to strike defendant's answer and for judgment;

17. Judgment;

18. Assignment of error;

19. Petition for writ of error;

20. Order allowing writ of error;

21. Supersedeas order;

22. Bond;

23. Citation and admission of service thereon;

24. Order extending return day;

25. Stipulation for printing transcript;

26. Praecipe for transcript;

27. This stipulation for the making of the record.

R. W. JENNINGS,
Attorney for Plaintiffs.

WICKERSHAM, HEILIG & RODEN,
H.
Attorneys for Defendant.

[Endorsements]: No. 1350. In the District Court for the Territory of Alaska, Fourth Division. C. J. Stewart et al., Plaintiffs, vs. Washington-Alaska Bank, Defendant. Stipulation as to Making up Record. Filed in the District Court, Territory of Alaska, 4th Div., Dec. 29, 1909. E. H. Mack, Clerk. By E. A. Henderson, Deputy. James Wickersham, Heilig & Roden, Attorneys for Defendant.

[Title of Court and Cause.]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, E. H. Mack, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the above and foregoing typewritten pages numbered one to eighty, inclusive, constitute a full, true and complete copy and the whole thereof, including the endorsements thereon, of the pleadings, motions, affidavits and all papers in the record required by the Rules of Court and the praecipe filed in this court, commanding the preparation of the record on appeal in the above-entitled cause.

I do further certify that the cost of preparing this record was Forty-eight Dollars and Ninety Cents ($48.90), and that the same has been paid by the plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of the Court, at Fairbanks, Alaska, this 5th day of January, A. D. 1910.

[Seal] E. H. MACK,
Clerk of the District Court, Territory of Alaska, Fourth Division.

By E. A. Henderson,
Deputy.

[Endorsed]: No. 1818. United States Circuit Court of Appeals for the Ninth Circuit. The Washington-Alaska Bank, a Corporation, Plaintiff in Error, vs. C. J. Stewart and C. M. Shaw, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Territory of Alaska, Fourth Division.

Filed February 3, 1910.

F. D. MONCKTON,
Clerk.

No. 1818

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE WASHINGTON-ALASKA BANK
(a corporation),
Plaintiff in Error,

vs.

C. J. STEWART and C. M. SHAW,
Defendants in Error.

Upon Writ of Error to the United States District Court for the District of Alaska, Division Number Four.

BRIEF FOR DEFENDANTS IN ERROR.

L. P. Shackleford,
Alfred Sutro,
Attorneys for Defendants in Error.

Filed this.....day of December, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

Pernau Publishing Co.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE WASHINGTON-ALASKA BANK
(a corporation),
Plaintiff in Error,
vs.
C. J. STEWART and C. M. SHAW,
Defendants in Error.

No. 1818

Upon Writ of Error to the United States District Court for the District of Alaska, Division Number Four.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of the Case.

By this writ of error, plaintiff in error, defendant below, is seeking the reversal of a judgment against it for $3,686.02, being the amount of usurious interest collected by it on six promissory notes. The facts in the case are as follows:

On September 22, 1909, C. J. Stewart, one of the plaintiffs below, filed his complaint, consisting of six causes of action, for the recovery from the defendant

Bank of $3,686.02. In his complaint Stewart alleged the making and giving of six separate promissory notes to the defendant Bank, upon each of which he was charged and paid the Bank interest at the rate of two per cent. per month. Each of the six causes of action counted upon interest paid upon a separate note. The prayer was for judgment for double the amount of the unlawful interest paid on each note (Tr. pp. 1-9).

To this complaint the Bank demurred, specifying as its grounds of demurrer to each cause of action that it did not state facts sufficient to constitute a cause of action, and that the Court had no jurisdiction of the subject of the action (Tr. pp. 10-11). The demurrer was overruled (Tr. pp. 11-12), and the Bank thereupon filed its answer. The only defense to each of the six causes of action was that, before the commencement of the action, Stewart had assigned the subject matter and cause of action, set forth in each cause of action, to one C. M. Shaw, who, it was averred, was the real party in interest (Tr pp. 12-15).

Upon the filing of this answer, Stewart made a motion and filed an affidavit. that he be permitted to amend his complaint, by making Shaw a party plaintiff, and by adding to each cause of action an allegation that the charging, collecting and receiving of the interest by the Bank was done in Alaska and with full knowledge that the same was illegal and wrongful, and also by adding an allegation that, before the commencement of the action, he had made a general assignment of all his property to Shaw, so as to enable Shaw to collect

the assets for the purpose of paying Stewart's creditors and of paying any remaining surplus to Stewart. The affidavit of Stewart recited that he was in doubt, whether or not in law the general assignment to Shaw passed to him the rights of action for usury set up in the complaint, but that Shaw was willing to be made a party to the suit, and that thereby the possibility, that defendant be subjected to any other suit on account of the usury complained of, would be removed (Tr. pp. 15-18). Shaw also filed an affidavit, in which he stated that if, by reason of Stewart's assignment to him, he had any interest in the causes of action for usury, he was willing to be made a party plaintiff *and to be concluded by this action* (Tr. pp. 18, 19). The Bank filed written objections to Stewart's application for leave to amend (Tr. p. 20), but they were overruled and Stewart was allowed to file an amended complaint (Tr. p. 21). This he did by making Shaw a party plaintiff, by adding to each cause of action an allegation to the effect that the charging, collecting and receiving of the interest was done by the Bank in the District of Alaska, and with knowledge of its illegality and wrongfulness and by also adding to each cause of action an allegation of the assignment to Shaw (Tr. pp. 22-34).

The Bank demurred to each cause of action of the amended complaint upon the grounds that each failed to state facts sufficient to constitute a cause of action, and that several causes of action had been improperly united (Tr. pp. 35-36). This demurrer was overruled

(Tr. pp. 36-37), and the Bank thereupon filed its answer to the amended complaint. It made no denial of any allegation of the amended complaint, but simply averred as a defense to each cause of action that neither Stewart nor Shaw "are the real parties in interest in " this action, but that the West Coast Grocery Com- " pany, a corporation, * * * is the real party in in- " terest"; that some time prior to the filing of the amended complaint Stewart assigned his right, title, claim and interest in each cause of action to the Grocery Company; that Stewart is insolvent and that his assets, "together with the total amount claimed in the " amended complaint will not pay all his debts and lia- " bilities to the said West Coast Grocery Company, and " to his other creditors", and that Stewart has no interest whatever in the causes of action; it is further averred as a defense that the action has been brought on behalf of the Grocery Company "in the name of " plaintiffs to avoid the defense that said cause of " action is not assignable and with the distinct under- " standing and agreement between plaintiffs and said " West Coast Grocery Company that said West Coast " Grocery Company would pay all costs and expenses " and attorney's fees", and further that the plaintiffs should not be held in any way responsible for costs and attorney's fees and that the Grocery Company had employed the attorney prosecuting the suit and had advanced all necessary costs and expenses for its prosecution and that it was the exclusive beneficiary in each cause of action and the only and real party in interest therein; that the plaintiffs had no interest whatever in

the subject matter of any one of the causes of action nor any interest in or to any judgment that might be recovered against the defendant, but that "the same and " the whole thereof is for the benefit of said West Coast " Grocery Company" (Tr. pp. 37-47).

Upon the filing of this answer the plaintiffs made a motion that the same be stricken from the record; that they have judgment as prayed for in their amended complaint, for the reason that the answer was sham and frivolous and raised no issue and was not interposed in good faith, but solely for the purpose of delay (Tr. pp 47- 48). In support of this motion Stewart filed an affidavit, in which he recited the proceedings in the suit up to the filing of the answer to the amended complaint, and further stated that the amended answer was filed so as to delay the recovery of a judgment, inasmuch as the defendant was contemplating the sale of all of its property and realized that, if a judgment were recovered against it, after the sale of its property, the collection of the judgment would be worthless (Tr. pp. 48-52). The Bank moved to strike this affidavit from the files (Tr. p. 53). Thereafter upon the hearing of the motion, to strike the answer from the files and for judgment, the Bank asked to amend its answer, by averring that Shaw "is and at all times mentioned in said " amended complaint was the agent and employee of " said West Coast Grocery Company". The Court denied this motion; also denied the motion of the Bank to strike Stewart's affidavit from the files and granted the motion of the plaintiffs to strike the Bank's amended answer from the files and for judgment (Tr. pp.

54, 56). Thereupon judgment in favor of the plaintiffs was duly made and entered in accordance with the prayer of the amended complaint (Tr. pp. 56, 57). The Bank filed a petition for writ of error and its assignment of errors and perfected its writ of error to this Court (Tr. pp. 57, 68).

Argument.

FIRST: IN VIEW OF THE FACT THAT AN AMENDED COMPLAINT WAS FILED, THE RULING OF THE COURT WITH REFERENCE TO THE ORIGINAL COMPLAINT BECAME IMMATERIAL.

The first error assigned is that the trial Court erred in overruling defendant's demurrer to the original complaint. An amended complaint was filed, however, and, therefore, the question, whether or not the Court erred in overruling the demurrer to the original complaint is immaterial. It is well settled that, when a pleading is amended, the amended pleading supersedes the original pleading, and an order of a trial Court, in overruling a demurrer to the original pleading, will not be reviewed. In such a case the sufficiency of the amended pleading alone, will be considered. See,

Wells v. Applegate, 12 Ore. 208;
Walsh v. McKeen, 75 Cal. 519;
Rooney v. Gray Bros., 145 Cal. 753.

In the case last cited the Supreme Court of California said:

> "If this second amended complaint was not vulnerable to the attack the defendants made upon it

by demurrer or motion to strike out, then it is of no moment whether the Court erred in its rulings on the demurrer or motion to the previous pleadings of the plaintiff or not; the sufficiency of this last pleading is alone in question."

SECOND: THE TRIAL COURT DID NOT ERR IN PERMITTING THE ORIGINAL COMPLAINT TO BE AMENDED SO AS TO JOIN SHAW AS A PARTY PLAINTIFF.

Plaintiff in error complains of the action of the trial Court in permitting the joinder of Shaw as a co-plaintiff with Stewart.

It is contended that the causes of action set forth in the original and amended complaints were assignable; that the allegations of the amended complaint show that the assignment by Stewart, the sole plaintiff named in the original complaint, to Shaw, had divested Stewart of all interest in the causes of action, before the original complaint was filed, and that, therefore, it was error for the trial Court to have permitted the amendment, joining Shaw as a party plaintiff.

But, counsel err in their contention. The amended complaint does not show that Stewart, by the assignment, had parted with *all* of his interest in the causes of action. On the contrary, it is alleged, in paragraph five of each of the counts in the amended complaint (Tr. pp. 23, 25, 27, 29, 31 and 33), that the assignment to Shaw by Stewart, before the commencement of the action, of his various properties, including the causes of action for the statutory penalties, was made "for

" the purpose of enabling him, the said C. M. Shaw, to " collect the assets and pay the debts of the said C. J. " Stewart and to pay the surplus, if any, to the said " C. J. Stewart". It thus appears that, by the assignment to Shaw, Stewart *did not part* with *all* of his interest in his various properties, including the causes of action sued on, but parted only with so much of his interest therein as might be necessary to pay his debts, *the surplus to be repaid to him.* According to the allegations of the amended complaint, therefore, Shaw was interested in so much of the recovery sought, as might be necessary for the payment of Stewart's debts, while Stewart was interested in such recovery to the extent of the balance remaining.

It is *suggested,* in the brief of plaintiff in error, that it appears from the averments of defendant's answer that Stewart had no interest whatsoever in the recovery sought, but, of course, in determining the propriety of the action of the trial Court in allowing the amendment, the answer of the defendant, filed *after* the amendment was allowed, will not be considered.

1. *Stewart and Shaw were both interested in the recovery sought by the action at the time of its commencement; they could, therefore, have been properly joined as plaintiffs in the original complaint, and, this being so, it was, of course, proper, by amendment, to have permitted Shaw to be added as a party plaintiff.*

In the case of *Royal Insurance Co. v. Miller,* 199 U. S. 353, the Supreme Court of the United States held that, under statutes similar to Section 25 of the Code of Civil

Procedure of Alaska, and providing that actions shall be prosecuted in the names of the real parties in interest, it is proper to allow a new party to be brought in, by amendment, who has an interest in the *recovery sought* by the action, although his interest in such recovery is subordinate to the interest of the original plaintiff therein. In that case, which was on writ of error to the United States District Court for Porto Rico, a mortgagor had effected certain insurance upon the mortgaged property; this insurance, under the Spanish law, passed to the mortgagee without any actual assignment. A loss having occurred, Miller, the representative of the mortgagee, brought suit upon the policy against the insurance company. A third party, one Lucas Amadeo, claiming an interest in the proceeds of the policy under assignments from certain assignees of the mortgagor, was permitted, by amendment, to become a party plaintiff to the action and to allege that his right to participate in the recovery sought was subordinate to the right of the mortgagee. The action of the District Court, in permitting the addition, by amendment, of such third party as a plaintiff was assigned as error in the Supreme Court. The Supreme Court, however, overruled the assignment and held that the allowance of the amendment was entirely proper, saying:

> "The claims of both parties depended upon the contract of insurance. There was no inherent antagonism between the two claims, since the amendment making Lucas Amadeo a party expressly alleged that his rights in and to the policy were subordinate to those of Miller, special master. We

> consider the provisions of the code in procedure above quoted as analogous to the provision of the codes of a number of the States of the Union, by which an action is required to be brought *in the name of the real parties in interest*, and it is allowable to join as parties plaintiff those *having an interest in the recovery sought.* Fireman's Ins. Co. v. Oregon R. R. Co., 45 Oregon 53; Fairbanks v. S. F. & N. Pac. Ry. Co., 115 California 579; Home Ins. Co. v. Gilman, 112 Indiana 7; Winne v. Niagara Fire Ins. Co., 91 New York 185, 192; Pratt v. Radford, 52 Wisconsin 114."

This decision, we submit, is of itself sufficient authority for the proposition that, under statutes, providing that actions must be prosecuted *in the name of the real parties in interest,* it is proper to add, by amendment, a party plaintiff who has an interest *in the recovery sought,* subordinate to that of the original plaintiff.

2. *Even if it appeared, however, from the averments of the amended complaint that, at the time the original complaint was filed, Stewart had parted with all of his interest in the causes of action by his assignment to Shaw, still the allowance of the amendment, adding Shaw as a party plaintiff, will not justify a reversal.*

(a) Plaintiff in error cites certain State cases and especially, *Dubbers v. Goux,* 51 Cal. 153, saying that those cases hold that "one who has a cause of action " cannot be brought in and substituted as the sole plain- " tiff in the place and stead of one who has not, and " did not have, at the time the action was commenced, " any cause of action" (Brief, p. 28).

The purpose of these cases, we presume, is to show that, assuming that Stewart had no interest in the causes of action sued on, at the time of the commencement of the action, then, just as under the rule in these cases, it would have been error to have allowed the *substitution* of Shaw for Stewart as sole plaintiff in the action, so it was error to have permitted the *joinder* of Shaw as a co-plaintiff with Stewart.

But, the rule here invoked, even if predicated upon actual facts, is unavailing to the plaintiff in error in this Court. It is the well settled doctrine of the Federal Courts that when

> "a suit is brought in the name of a wrong party, *the real party in interest,* entitled to sue upon the cause of action declared on, may be *substituted* as plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff, has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff."
>
> *McDonald v. Nebraska* (C. C. A. 8th Circuit), 101 Fed. 171, 178.

In this case the Court reviews a large number of cases, which fully support the doctrine announced by it.

In *Chapman v. Barney,* 129 U. S. 677, one of the assignments of error was that: "The Court erred in per-" mitting a new sole plaintiff to be substituted for and " in the place of the sole original plaintiff." The Supreme Court overruled the assignment, holding that no error could be predicated thereupon.

The case of *Lusk's Administrators v. Kimball,* 91 Fed. 845, is cited by counsel for plaintiff in error in this connection. The case is erroneously cited for *Hodges et al. v. Kimball et al.* But, that case does not sustain their contention; on the contrary, it squarely upholds the doctrine of *McDonald v. Nebraska, supra.* In the *Hodges* case the Court held that, where an action was begun by a foreign administrator, without having taken out ancillary letters of administration, it was reversible error for the trial Court to have refused to permit an amendment to show his subsequent qualification by taking out ancillary letters.

And in *Person v. Fidelity & Casualty Co.* (C. C. A. 6th Circuit), 92 Fed. 965, the *Hodges* case was cited by the appellate Court, in support of its ruling, that it was error for the trial Court to have refused to allow an amendment, substituting a duly qualified administrator as plaintiff, in an action begun by another party, as administrator, who had never been appointed such.

Elliott v. Teal, 5 Sawy. 8 Fed. Cas. No. 4389, cited by plaintiff in error, simply holds that, under the provisions of the Oregon Code, where the real party in interest at the time of the commencement of the action, thereafter transfers his interest in the action, he may, notwithstanding such transfer, prosecute the action to final judgment. This case is, obviously, not in point to the question here under discussion.

In view of the rule obtaining in the Federal Courts, it is unnecessary to discuss the other State cases cited by plaintiff in error in this connection.

Under the rule in the Federal Courts, it would, therefore, not have been error for the trial Court to have allowed Shaw to have been substituted as the sole party plaintiff (assuming that Stewart had no interest in the causes of action sued on at the time of the filing of the original complaint).

(b) But, counsel say, even conceding that it would have been proper for the trial Court to have *substituted* Shaw for Stewart as the sole party plaintiff (assuming that Stewart had no interest in the causes of action at the time of the filing of the original complaint), still, it was error for the trial Court to have allowed the *joinder* of Shaw as a co-plaintiff with Stewart.

But, if the action of the trial Court in this respect was erroneous, we submit the error was harmless.

> "*It is unnecessary to cite authorities* to the proposition that, in order to promote justice, a Court may, in its discretion, permit amendment at any time before or during trial * * *."
>
> *Hoogendorn v. Daniel,* 178 Fed. 765, 767, Appeal from the District Court of Alaska.

It is the doctrine of the Federal, as well as of the State Courts, that

> "the elementary rule is that amendments are within the sound discretion of the trial Court, and are not susceptible of review on error, *except for a clear abuse.*" *Royal Ins. Co. v. Miller,* 199 U. S. 353, 369, citing *Gormley v. Bunyan,* 138 U. S. 623.

The fact that an unnecessary and improper party is joined with a proper party plaintiff cannot prejudice

the rights of the defendant in the action, for the reason that any judgment necessarily protects the defendant from any further suits upon the cause of action involved. It is, therefore, held that the joinder in a complaint of an unnecessary and improper party plaintiff is harmless error, even where the statute, governing the joinder, *provides that every action must be prosecuted in the name of the real party in interest.* See,

St. Louis I. M. & S. Ry. Co. v. Phillips, (C. C. A. 8th Circuit) 66 Fed. 35.

Besides, error in *overruling a demurrer for misjoinder of parties plaintiff* is harmless and will not justify a reversal. See,

Daley v. Ruddell, 137 Cal. 671;
Woollacott v. Meekin, 151 Cal. 701;
Telegraph Co. v. Neel, (Tex.) 35 S. W. 29;
Balfour Quarry Co. v. West Const. Co., (N. C.) 66 S. E. 217.

In *Carter v. Wilmington & W. R. R. Co.,* (N. C.) 36 S. E. 14, the State was joined as a party plaintiff in an action by citizens to recover *statutory penalties.* A demurrer for misjoinder of parties plaintiff, upon the ground that the State was an improper party, was overruled. The appellate Court said:

> "If the defendant is liable for the penalty, it makes no difference who gets it, as long as its liability is in no way increased."

And, therefore, the Court held the error of the trial Court in overruling the demurrer for misjoinder was harmless.

We submit, upon this branch of the case, that, in the first place, the amended complaint shows that both Shaw and Stewart, at the time of the commencement of the action, had an interest in the recovery sought by the action and that, therefore, the allowance of the amendment, joining Shaw as a co-plaintiff, was proper; and, in the second place, assuming that the amended complaint shows that, at the time that the original complaint was filed, Stewart had, by the assignment, transferred all of his interest in the causes of action to Shaw, nevertheless, the action of the trial Court in permitting Shaw to be joined with Stewart as a co-plaintiff, if error, was harmless and cannot justify a reversal.

THIRD: THE SEVERAL CAUSES OF ACTION WERE PROPERLY JOINED; BUT, EVEN IF THERE WAS A MISJOINDER, THERE IS NO GROUND FOR REVERSAL.

1 *Several separate causes of action to recover statutory penalties may be joined in one complaint under Sec. 84 of the Code of Civil Procedure of Alaska.*

Sec. 84 provides that

> "the plaintiff may unite several causes of action in the same complaint when they all arise out of First. Contract, express or implied; or * * * Third. Injuries, with or without force, to property * * *"

It is clear that the joinder in one complaint of several causes of action to recover statutory penalties is authorized both under the first and third subdivisions of this section.

(a) A cause of action to recover a statutory penalty is an action upon a contract implied in law and, therefore, several of such causes of action may be joined in one complaint.

The statute of Alaska provides, as do the statutes of most of the code States, that causes of action arising out of "contract express or implied" may be joined in one complaint.

When a person becomes liable, under a statute, to pay a penalty, the law implies a promise upon his part to discharge the obligation. There is, therefore, in such a case, a contract *implied in law,* on the part of the party liable, and for this reason it is held that assumpsit will lie to recover the penalty.

> *Mayor of Baltimore v. Howard,* 6 Harr. & J. 394;
> *Hillsborough v. Londonderry,* 43 N. H. 453;
> *Bath v. Freeport,* 5 Mass. 325.

The term "implied contract" as used in the statute, is to be given the meaning which it had at common law, and includes not only contract implied in fact, but also contract *implied in law.* See,

> *Bliss on Code Pleading,* 2nd Ed. Sec. 128.

Where money is paid under a mistake of fact, the obligation of the person receiving such money to repay it to the person from whom it is received constitutes a contract *implied in law;* and an action to recover money paid under a mistake of fact is based on "implied contract" within the meaning of that term as used in

statutes providing for the joinder of causes of action arising out of "contract express or implied". See,

Olmstead v. Dauphiny, 104 Cal. 635.

In *State of Nevada v. Y. J. S. Mining Company,* 14 Nev. 220, 250, cited and relied on by plaintiff in error, Chief Justice Beatty, in a dissenting opinion, demonstrates that, under the provision of the codes of the various States, permitting the joinder of causes of action arising out of "implied contract", the joinder of causes of action arising out of contracts *implied in law,* as well as those arising out of contracts implied in fact, is authorized, and that it is proper to join, in one complaint, several causes of action to recover statutory obligations, because such actions arise out of contract *implied in law.*

In North Carolina the statute provides that a plaintiff may unite in the same complaint several causes of action, where they all arise out of "contract express or implied". It was held that, under such a statute, a party may joint in one complaint several separate causes of action for different statutory penalties, because such causes of action are *"ex contractu".* See,

Katzenstein v. R. R. Co., 84 N. C. 688;
Maggett v. Roberts et al., (N. C.) 12 S. E. 890.

In volume 23 of *Cyc.,* at page 408, the author, speaking of the joinder of causes of action under the codes, says:

> "Actions for the recovery of statutory penalties are usually regarded as upon contract * * *. An action based upon a duty imposed by statute is regarded as upon contract * * *."

It is submitted, therefore, that, as causes of action to recover statutory penalties arise out of contract, *implied in law,* several of such causes of action may be joined in one complaint under the first subdivision of Section 84 of the Code of Civil Procedure of Alaska, providing for the joinder of causes of action arising out of "contract express or *implied*".

(b) The several causes of action were properly joined in one complaint under the third subdivision of Section 84, for each of such actions arose out of an injury to property.

Although the plaintiff Stewart voluntarily paid to the Bank the usurious interest, nevertheless, the Bank had no right to retain it, and by retaining it, the Bank wrongfully converted property of Stewart. Such conversion constituted an injury to the plaintiff's property, for such injury, the Alaska statute gave to plaintiff a cause of action, and under the third subdivision of Section 84, several of such causes of action could be joined in one complaint.

In the case of *Railroad Company v. Cook,* 37 Ohio State Reports 265, a statute of Ohio provided that a penalty should be imposed upon railroad companies, in favor of the party aggrieved, for overcharging for the transportation of passengers or property. The Ohio Code provided that several causes of action might be joined in the same petition, "when they are included " in either one of the following classes; * * * 3. In- " juries, with or without force, to person or *property* " or either". The Supreme Court, in holding that,

under the Code a plaintiff might unite in one petition several causes of action to recover penalties incurred under the said penal statute, said:

> "There is no doubt that this section should be construed liberally for the purpose of preventing multiplicity of actions, and we are inclined, under this rule of construction, to hold that the causes of action in the petition are for *injuries to property;* and if this be so the joinder was proper. The wrongful taking of another's property is an injury to the property. Wrongfully demanding and receiving the plaintiff's money for fare in excess of the amount authorized by law, *was an injury to her in her property.* Although it was paid without protest, the Company acquired no right to retain it. It being unlawful to demand or receive it, the railroad company unlawfully exacted and *converted* it; for this wrong and injury, the statute gave the plaintiff a right of action; and our best judgment is that *several causes of action for such injuries may be united in the same petition.*"

This case was followed in *Snow v. Mast,* 65 Fed. 995, where it was held that several causes of action for statutory penalties might be joined, both at common law and under a code provision, permitting the joinder of causes of action for injuries to property.

It is submitted, therefore, that, under both the first and third subdivisions of Section 84 of the Alaska Code of Civil Procedure, it was entirely proper for the plaintiffs to have united in one complaint several causes of action for the recovery of the statutory penalties, for which the defendant was liable under Section 257 of the Civil Code of Alaska.

2. *The cases, cited by plaintiff in error, in support of the proposition that several causes of action, to recover statutory penalties, cannot be joined in one complaint under the first subdivision of Section 84 of the Alaska Code of Civil Procedure, are either distinguishable or are of doubtful authority.*

In the case of *People v. Koster,* 97 N. Y. Supp. 829, it was held that, as the statute *expressly* provided for the joinder of causes of action for penalties incurred under the "Fisheries, Game and Forest Law", the joinder of causes of action for penalties under the "*Agricultural* Law" was excluded. This result was obviously reached by an application of the maxim "*expressio unius*", etc. The question, whether the joinder of several causes of action to recover penalties, might be supported under the provision of the statute permitting the joinder of several causes of action arising out of *contract,* was not considered by the Court.

In *Sullivan v. New York etc. R. R. Co.,* 19 Blatch. 388; 11 Fed. 848, it was held that an action for a statutory penalty could not be joined in one complaint with an action for *personal injuries,* for the reason that the statute, with reference to the joinder of causes of action, expressly provided, as do most similar statutes, that several causes of action could not be joined, unless they all belonged to a particular class enumerated in the statute; one of such classes being actions for personal injuries.

The case of *Brown v. Rice,* 51 Cal. 489, holds that several causes of action to recover statutory penalties,

which were united in the complaint in that case, were improperly joined; but, it is submitted, this case is not valuable as authority for the reason that the Court therein, *without stating any reason whatsoever for its decision,* simply said "that the several causes of action "found in the complaint, though separately stated, "were improperly united"; and also because of the fact that the later case of *Olmstead v. Dauphiny,* 104 Cal. 635, *supra,* is directly opposed, in principle, to the Brown case.

The ruling of the Court in the case of *Louisville & Nashville R. R. Co. v. Commonwealth,* 102 Ky. 330; 43 S. W. 458, and cited by plaintiff in error on page 14 of its brief, is *dictum* pure and simple, for the Court *expressly stated* in its opinion that *it was not necessary* to determine whether or not there was a misjoinder of causes of action, in view of the fact that another question, already considered by the Court, disposed of the appeal.

The Supreme Court of Nevada, in *State v. The Yellow Jacket Silver Mining Company,* 14 Nev. 220, held that several actions to recover statutory penalties or other statutory obligations could not be united in one complaint under a statute, permitting the joinder of causes of action arising out of contract express or implied. The opinion of the Court was delivered by Leonard, J., one other Judge concurring, while Chief Justice Beatty delivered a vigorous dissenting opinion, to which we have hereinbefore referred.

On page 14 of their brief, counsel cite the following from page 281 of 16 Enc. of P. & P.:

> "In Code states * * * the joinder of distinct causes in penal actions is frequently prohibited either in terms or by implication."

This quotation does not require particular comment, for the cases cited in its support are those cited by counsel, besides the case of *Carrier v. Bernstein,* 104 Iowa 572. This case wholly fails to support the text; it decides that two separate actions for penalties cannot be joined in one complaint, where such actions are brought by a single plaintiff *acting in different capacities.*

In *McCoun v. R. T. Co.,* 50 N. Y. 176, erroneously cited by plaintiff in error for the case of *McCoun v. N. Y. C. & H. R. R. Co.*, the first question, upon which the Court was asked to pass, was whether a summons, issued upon a complaint in an action to recover a statutory penalty, was regularly issued under a section of the Code providing for the issuance of summons in actions "arising on contract"; but, the Court held that, whether or not such summons was regularly issued under such section of the Code was immaterial, because the defendant could not have been prejudiced in any event. Anything in the opinion, tending to support *counsel's* position, was mere *dictum.* Besides, the code section involved did not, by its terms, apply to contract "express *or implied",* but to "contract" *unqualified.* It is clear, therefore, that what is said in the opinion is not even *dictum* supporting the proposition that an

action to recover a statutory penalty is not an action upon an implied contract.

3. *Even assuming, however, that several causes of action were improperly joined in the complaint, nevertheless, because of the failure of the demurrer to distinctly specify the grounds of objection, the trial Court did not err in overruling the demurrer for misjoinder of causes of action.*

The only error of the trial Court, assigned by plaintiff in error, with reference to the question of misjoinder of causes of action, was the order in overruling defendant's demurrer for misjoinder.

The fifth subdivision of Section 58 of the Alaska Code of Civil Procedure provides that the defendant may demur to the complaint when it appears upon the face thereof "that several causes of action have been improperly united". And Section 59 provides:

> "The demurrer shall distinctly specify the grounds of objection to the complaint; unless it does so it may be disregarded * * *."

In demurring to both the original and amended complaints, the plaintiff in error simply followed the language of the statute, stating "that several causes of " action have been improperly united" (Tr. pp. 9, 35). The demurrer failed to specify wherein there was misjoinder of causes of action, and it was, therefore, properly disregarded and overruled. It is uniformly held that, where the Code prescribes, as a ground of demurrer, misjoinder of causes of action or misjoinder of

parties, and also provides that the demurrer shall distinctly specify the grounds of objection, it is not sufficient for the demurrer to merely follow the language of the statute, but it must specify wherein the misjoinder consists; otherwise it must be overruled. See,

O'Callaghan v. Bode, 84 Cal. 489;
Healy v. Visalia & T. R. R. Co., 101 Cal. 585;
Irwine v. Wood, 7 Colo. 477;
Owen v. Oviatt, 4 Utah 95;
State v. Metschan, (Ore.) 46 Pac. 791.

In *Healy v. Visalia etc. R. R. Co., supra,* the Supreme Court of California said:

> "A demurrer to a complaint upon the ground that several causes of action have been improperly united should specify the several causes of action. *It is not sufficient to merely state that several causes of action have been improperly united in the complaint, without* at the same time pointing out those to which the demurrer is intended to refer" (101 Cal. at page 593).

In *State v. Metschan, supra,* it is said by the Supreme Court of Oregon that a demurrer in the language of the statute is insufficient, and *"the question is not raised by the demurrer".*

4. *By answering the amended complaint the plaintiff in error waived the objection, that there was a misjoinder of causes of action in the amended complaint.*

Even if we assume, however, that there was a misjoinder of causes of action; that the defendant's demurrer, based upon that ground, was in proper form, and

that, therefore, the trial Court erred in overruling it, still, there could not be a reversal on account of such error, because, after the demurrer had been overruled, defendant answered and, by doing so, waived any error which it might otherwise have predicated upon the order overruling the demurrer.

The courts of Oregon, in considering the provisions of the Codes of that State relating to the subject of demurrers, have held, following the rule of the Federal Courts (*Campbell v. Wilcox,* 10 Wall. 421; *Marshall v. Vicksburg,* 15 Wall. 146), that, by answering over, a defendant waives any error of the trial Court in overruling a demurrer to the complaint, except, perhaps, when the demurrer goes to the jurisdiction of the Court, or to the sufficiency of the facts.

Richards v. Fanning, 5 Ore. 356;
Olds v. Cary, 13 Ore. 362;
Drake v. Swortz, 24 Ore. 198, 201;
Byers v. Ferguson, (Ore.) 68 Pac. 5.

The provisions of the Alaska Code, upon the subject of demurrers, are identical with those of the Oregon Code upon the same subject, and, as counsel say (Brief, p. 27), "the interpretation put upon the Oregon Codes " and Statutes by the Courts of that State will be fol- " lowed by this Court in dealing with the provisions of " the Alaskan Code which are taken bodily from the " Codes of that State".

FOURTH: THE COURT BELOW DID NOT ERR IN OVERRULING THE GENERAL DEMURRER TO THE AMENDED COMPLAINT.

Counsel assign, as ground for reversal, the order of the trial Court in overruling the general demurrer to the amended complaint, and contend that said demurrer should have been sustained, first, because there was no allegation in the amended complaint that the Bank received the usurious interest with knowledge that the taking thereof was illegal, and, second, because there was a misjoinder of parties plaintiff in the said complaint.

1. *It was unnecessary to allege that the Bank received the usurious interest, knowing that the taking thereof was illegal, in order to state a cause of action based upon Section 257 of the Civil Code of Alaska.*

In support of their contention counsel cite the case of *Garfunkle v. Bank of Charlestown*, 79 N. C. 404, in which, they say, it was held that a complaint to recover usurious interest under Section 5198 of the Revised Statutes of the United States should allege that the usurious interest was "knowingly received". The case cited is, however, wholly inapplicable to the case at bar. The Garfunkle case involved an action to recover usurious interest under Section 5198 of the Revised Statutes. which provides *in express terms* that, in order for a penalty to attach to the receiving of usurious interest by a National Bank, *the taking thereof must be "knowingly done";* therefore, knowledge is an essential element of a cause of action against a National Bank

under the statute. Section 257 of the Civil Code of Alaska, upon which the complaint in the case at bar is based, does not, however, make knowledge an element of the cause of action, but provides, *without* qualification, that, if usurious interest "shall hereafter *be received or collected*", the person receiving the same shall be liable. It is manifest that Section 257 does not make the liability of the person receiving the usurious interest at all dependent upon whether such interest is received with knowledge that the receiving thereof is illegal. Under the Alaska statute knowledge is a wholly immaterial factor in the determination of liability; for it is well settled that, where a statute provides for a penalty for the doing of an act and does not, *in terms*, make liability conditional upon knowledge of the illegality of such act, liability for the penalty will attach *even in the absence of such knowledge*. See,

United States v. Thomasson, 28 Fed. Cas. No. 16478;

Quimby v. Waters, 28 N. J. L. 533;

Monroe Dairy Assn. v. Stanley, 20 N. Y. Supp. 19.

Knowledge of the illegality of the taking of the usurious interest was not a condition precedent to liability for the penalty provided by the Alaska statute, and it was, therefore, of course, unnecessary for the plaintiff to have alleged such knowledge.

2. *But, even if it had been necessary, in order to have stated a cause of action under the Alaska statute, to have alleged knowledge on the part of the defendant Bank of the illegality of the transaction, the amended complaint was sufficient in this respect as against a general demurrer.*

It is alleged in each of the counts of the amended complaint that the interest paid by Stewart to the Bank was in excess of the amount allowed by law, "and the "receiving and collecting thereof was illegal and in "contravention of" the Alaska statute, and that "the "charging, collecting and receiving of said interest was "done by said defendant in the District of Alaska and "*with full knowledge that the same was illegal and "wrongful*".

This allegation, as to the knowledge of the defendant that the taking of the said interest was illegal and wrongful, is entirely sufficient as against a *general demurrer.*

It is well settled, both at common law and under the Codes, that an averment of a material fact by way of recital, while perhaps bad *in form*, is entirely sufficient as against a *general demurrer.* See,

Chitty on Pleading, p. 302;
Fuller Desk Co. v. McDade, 113 Cal. 360;
Santa Barbara v. Eldred, 108 Cal. 294;
Bank v. Angell, (R. I.) 29 Atl. 500.

Even if, therefore, an allegation of knowledge on the part of the Bank of the illegality of the transaction was essential to the statement of a cause of action against

it, the allegation in the amended complaint of the Bank's knowledge was entirely sufficient as against its general demurrer.

3. *No error can be predicated upon the action of the trial Court in overruling the general demurrer, even if it be assumed that it appeared on the face of the amended complaint that there was therein a misjoinder of parties plaintiff.*

In support of their contention that it was error for the trial Court to have overruled the general demurrer (assuming, of course, that there was a misjoinder of parties plaintiff apparent on the face of the complaint) counsel cite the case of *Cohn v. Ottenheimer,* 13 Ore. 225, saying that, in that case, it was held that, where a statute, such as that of Oregon, which is similar to the Alaska statute, does not provide for demurrer upon the specific ground of misjoinder of parties, the question of such misjoinder may be raised by general demurrer.

There is a marked conflict in the decisions of the various Courts upon this question, and many cases might be cited in support of the proposition that, where the Code does not provide for a demurrer upon the ground of misjoinder of parties, an objection upon that ground cannot be raised by general demurrer. But, even in those cases in which it is held that the question of misjoinder of plaintiffs may be so raised, it is *further* held that the demurrer must specify the plaintiff in favor of whom it is claimed no cause of action is stated; for, if the demurrer is general, stating simply, as is the case here, that the complaint "does not

" state facts sufficient to constitute a cause of action", without specifying the plaintiff, in favor of whom it is claimed no cause of action is stated, the demurrer must be overruled, if the complaint states a cause of action *in favor of any one of the plaintiffs.*

> "The demurrer upon the *general ground that the complaint does not state facts sufficient to constitute a cause of action,* was properly overruled, because a general demurrer is not sustainable if the complaint states a cause of action in favor of *any one* of several plaintiffs."
>
> *O'Callaghan v. Bode,* 84 Cal. 489, 495.

> "If, therefore, a cause of action is set out in favor of any party plaintiff the (general) demurrer * * * must be overruled."
>
> *Nevil v. Clifford,* 55 Wis. 161.

It follows, therefore, that, as the amended complaint concededly stated a cause of action in favor of at least one of the plaintiffs, the general demurrer was properly overruled.

FIFTH: THE TRIAL COURT DID NOT ERR IN STRIKING FROM THE FILES THE ANSWER OF THE DEFENDANT TO THE AMENDED COMPLAINT.

1. *Assuming that defendant's answer to plaintiffs' amended complaint, on its face, states a good defense, nevertheless, such answer was sham and frivolous and, therefore, was properly stricken from the files under Section 66 of the Alaska Code of Civil Procedure.*

Section 66 provides, as do the codes of most of the States, that "sham, frivolous and irrelevant answers "and defenses may be stricken out on motion", etc. And an answer is sham when, although good in form, it is not pleaded in good faith. See,

Piercy v. Sabin, 10 Cal. 22;
Gostorfs v. Taaffe, 18 Cal. 385;
Greenbaum v. Turrill, 57 Cal. 285;
Association v. Boggess, 145 Cal. 30.

It is apparent from the *pleadings* that defendant's answer was sham and it was, therefore, properly stricken out on motion of plaintiffs.

In its answer to the original complaint defendant alleged that, before the commencement of the action, Stewart had assigned to Shaw the causes of action sued on; that answer was *verified by the cashier of the defendant Bank.* After that answer was filed, Stewart asked the Court to be permitted to amend the complaint by including Shaw as a party plaintiff, in order to meet the objection raised by defendant's answer. The amendment was allowed, and, after the amended complaint was filed, defendant filed its answer averring, without any reason whatsoever for its remarkable change of position, that *neither* Stewart nor Shaw had any interest in the cause of action sued upon, but that, prior to the commencement of the action, Stewart had assigned all of his interest in the causes of action to West Coast Grocery Company. This answer *was also verified by the cashier of the defendant Bank.* Neither in its answer to the original complaint, nor in its answer to the

amended complaint, did the defendant even attempt to plead any defense *on the merits;* the only defense set up in each answer was that the action was not brought by the real party in interest. In its answer to the amended complaint the defendant, therefore, averred, under oath, that the verified averments in its answer to the original complaint were *untrue;* and it made no pretense of pleading in its second answer any fact, or circumstance whatsoever, having even a tendency to remove the bad faith, with which it had thus charged itself.

Manifestly, the answer to the amended complaint was not interposed in good faith, and it was apparent that the defendant, by trifling with the Court, was endeavoring to delay recovery upon causes of action to which, concededly, it had no defense.

Under these circumstances, we submit, that the trial Court properly exercised the discretion vested in it, under Section 66 of the Code of Civil Procedure of Alaska, in striking from the files defendant's answer.

2. *The action of the Court in striking out defendant's answer may also be sustained upon the ground that the answer contains no averment whatever of any fact which would be a defense to the causes of action set forth in the amended complaint.*

Stripped of unnecessary verbiage, the averments of defendant's answer are, solely, that neither of the plaintiffs has any interest in the said causes of action, but that the West Coast Grocery Company alone is the real party in interest; that the said West Coast Grocery

Company is prosecuting the suit in the name of the plaintiffs; has employed the attorney for the plaintiffs, at its own expense, and has advanced all necessary costs and expenses for the prosecution thereof.

In *Giselman v. Starr*, 106 Cal. 651, the Supreme Court of California, in considering the rights of a defendant to insist upon an action being prosecuted in the name of the real party in interest, said that where it appeared

> "that a judgment upon it (the cause of action) satisfied by defendant would protect him from future annoyance or loss, and where, as against the party suing, defendant can urge any defense he could make against the real owner, then there is an end of the defendant's concern and with it of his right to object; for, so far as he is interested the action is being prosecuted in the name of the real party in interest."

In *Sturgis v. Baker,* 43 Ore. 236; 72 Pac. 746, *supra,* Judge Wolverton, speaking for the Supreme Court of Oregon, said:

> "The statute requiring that every action shall be prosecuted in the name of the real party in interest (B. and C. Comp., Sec. 27) was enacted for the benefit of a party defendant, to protect him from being again harassed for the same cause. But if not cut off from any just set-off or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end."

To the same effect are

Price v. Dunlap, 5 Cal. 483;

Gushee v. Leavitt, 5 Cal. 160;

Los Robles Water Co. v. Stoneman, 146 Cal. 203.

Tested by the foregoing rule, it is perfectly clear that defendant's answer to the amended complaint constituted no defense to the action.

In its said answer defendant *wholly failed to allege any fact* to show that, because the action was not prosecuted in the name of the West Coast Grocery Company, it was deprived of the right to urge any defense which it might have had against the Grocery Company.

Besides, the averments in the answer, that the West Coast Grocery Company *is prosecuting the action and conducting the litigation in the name of the plaintiffs,* are entirely sufficient to show that the said company would be bound by any judgment rendered in the action, and which would also be a complete protection to the Bank from any further suits on the same cause of action.

> "One who institutes and conducts a litigation in another's name is estopped by the decision or judgment therein from again contesting the same issues with his adversary, or those in privity with him, as completely as the party in whose name he carries on the controversy. Lovejoy v. Murray, 3 Wall. 1, 18, 18 L. Ed. 129; Tootle v. Coleman, (C. C. A.) 107 Fed. 41."
>
> *James v. Germania Iron Co.,* (C. C. A. 8th Circuit) 107 Fed. 597, 613.

In *Cramer v. Manufacturing Company,* (C. C. A. 9th Circuit) 93 Fed. 636, 637, this Court said:

> "In so holding the Circuit Court applied the well settled rule that one who, for his own interests, assumes the defense of an action, is bound by the judgment as if he had been a party thereto or in privity with the defendants."

To the same effect are

Lane v. Welds, (C. C. A. 6th Circuit) 99 Fed. 286;

Theller v. Hershey, 89 Fed. 575;

Greenwich Ins. Co. v. N. & M. Friedman Co., 142 Fed. 944.

It is clear, therefore, that the West Coast Grocery Company, even if it was the real party in interest, is bound by the judgment rendered in this action; and, as the answer does not disclose that the defendant has any defense to the action as against the West Coast Grocery Company, which it could not urge against the plaintiffs, and, as it further *affirmatively appears* from the answer that any judgment rendered in the action would be binding on West Coast Grocery Company, assuming that it is the real party in interest, and would protect defendant from any further suits upon the same cause of action, it necessarily follows that the amended answer failed to state any defense to the causes of action set up in the amended complaint.

The trial Court, under these circumstances, properly struck out the answer, upon the ground that the same was "irrelevant" under Section 66 of the Alaska Code of Civil Procedure.

SIXTH: THE TRIAL COURT DID NOT ERR IN REFUSING TO STRIKE OUT THE AFFIDAVIT OF STEWART, FILED WITH THE NOTICE OF MOTION TO STRIKE OUT DEFENDANT'S ANSWER.

In subdivision VII of their brief, counsel argue that the Court below erred in refusing to strike out the affi-

davit of Stewart, which was filed with plaintiff's motion to strike out the answer. This argument is based upon assumption that the affidavit was used upon the hearing of the motion and was considered by the trial Court in passing upon it.

1. The record, however, wholly fails to show, either that the affidavit was used upon the hearing of the motion, or that it was considered by the trial Court. Of course, unless the affidavit was considered by the Court below in passing upon the motion, it is of no moment whether it was improper for the plaintiff to have filed it, or whether it was error for the trial Court to have refused to have stricken it out after it was filed.

Waiving, because of the stipulation of counsel found on page 72 of the Transcript, the objection that neither the affidavit nor the refusal of the trial Court to strike it out can be considered by this Court for the reason that it is not embodied in a bill of exceptions, we still insist that no error can be assigned upon the refusal of the trial Court to strike out the affidavit, for the reason that the *record wholly fails to show*, either by stipulation of the parties, or by bill of exceptions, or otherwise, that the affidavit was ever *used before the trial Court*, or considered by it in passing upon the motion

It is elementary that an assignment of error, based upon evidence contained in the record, but

> "not embodied in a bill of exceptions, or otherwise authenticated *as having been used before the Court below* * * * cannot * * * be considered here."

See,

Lee Won Jeong v. United States, (C. C. A. 9th Circuit) 145 Fed. 512, 513;

Carr v. Fife, 156 U. S. 494.

2. In any event, it is clear that the Court below did not err in refusing to strike out the affidavit. The only statement in the affidavit which could, upon any theory, be complained of, is that "said answer is false in each " and every particular, save the allegation of my in- " solvency". In its motion to strike out, however, defendant did not ask to have that statement stricken out, but moved to strike out the affidavit *as a whole* and, as the statements in the affidavit, other than that particular allegation, are, concededly, unobjectionable, no error could have been committed by the trial Court in denying the motion; for

> "motion is properly denied where it is too broad in its scope and cannot be sustained as an entirety".
>
> *31 Cyc.* 663.

3. Assuming, however, that the record did show that the affidavit of Stewart was used before the trial Court, and assuming also that it should have been stricken out, still, we submit, it affirmatively appears that any error committed by the Court below, in refusing to strike out the affidavit, was harmless.

As we have hereinbefore shown, it appears *from the record itself,* that defendant's answer was sham and frivolous, and it further appears that the answer was

wholly irrelevant, as it contained no averments constituting any defense to the action. Upon *these* grounds, the answer was properly stricken out. The action of the trial Court in striking out defendant's answer can, therefore, be supported upon grounds other than, and entirely independent of, any statements in Stewart's affidavit. The result upon the motion to strike out the answer would have been the same with or without the affidavit. It is clear, therefore, that any error in refusing to strike out the affidavit, even if the trial Court considered the same in passing upon the motion, was immaterial and harmless.

> "Evidence, improperly admitted, in a case tried before a *Court* must be of such kind and so forceful that it should work a different result from that arrived at by the trial Court"; otherwise the admission thereof is harmless.
>
> *Streeter v. Sanitary District,* (C. C. A. 7th Circuit) 133 Fed. 124, 131.

SEVENTH: THE TRIAL COURT DID NOT ERR IN ORDERING JUDGMENT TO BE ENTERED AGAINST THE BANK IN FAVOR OF BOTH PLAINTIFFS. IF IT WAS ERROR IT WAS HARMLESS.

It is contended by plaintiff in error that, if the causes of action sued on were assignable, then Stewart had no interest in the judgment, while, if the said causes of action were not assignable, then Shaw had no interest in the judgment, and that, therefore, they could not both be entitled to judgment.

We have already shown, however, that, even assuming that the causes of action were assignable as contended by counsel, still the allegations of the amended complaint show that both Stewart and Shaw had an interest in the causes of action and that, therefore, both of them were proper parties plaintiff. If this be so, then, of course, it was proper for the Court to have ordered judgment in favor of both of them.

But, assuming that the contention of counsel, that it appears from the amended complaint that the whole interest in the causes of action sued on was either in Stewart or in Shaw, is sound, nevertheless, any error committed by the trial Court, in ordering judgment in favor of both of the plaintiffs, would be entirely harmless; for, as we have hereinbefore shown at some length, the payment by the Bank, of the judgment rendered against it, will fully protect it against any further suits upon the causes of action, whether the title to the causes of action was in Stewart, or in Shaw, or in both of them. The Bank, therefore, is in no position to complain.

For the reasons herein stated, it is respectfully submitted that the record does not disclose the commission of any error by the Court below; and, also, that should any action of the Court below complained of by the plaintiff in error, be considered error, it was harmless and without prejudice to the rights of the plaintiff in error, and that the judgment should, therefore, be affirmed.

L. P. Shackleford,
Alfred Sutro,
Attorneys for Defendants in Error.

No. 1821

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STEAMSHIP COMPANY (a Corporation), Claimant of the American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,

Appellants,

vs.

THOMAS HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS, Libelants,

Appellees.

APOSTLES.

Upon Appeal from the United States District Court for the Northern District of California.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Stipulation Under Admiralty Rule 4.]

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,

Libelants,

vs.

American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,

Respondents.

UNITED STEAMSHIP COMPANY (a Corporation),

Claimant.

It is hereby stipulated by and between the respective parties hereto, under Admiralty Rule 4 of the United States Circuit Court of Appeals, for the Ninth Circuit, that the Apostles herein may omit therefrom all of the record, testimony, papers and proceedings filed, taken or had herein, except the following, which shall be set forth in said Apostles.

1. A caption exhibiting the proper style of the Court, and title of the cause; and a statement showing the time of the commencement of the suit, the names of the parties thereto, including claimant, the respective dates when the pleadings herein were filed, the time when the trial hereof was had, the name of the Judge hearing the same, the result of said trial,

date of entry of Interlocutory Decree, reference of question of damages to the Commissioner, result of the proceedings taken before such Commissioner and of his Report thereon, exceptions thereto, and date of the entry of the Final Decree, as well as date when the Notice of Appeal therefrom was filed.

2. The Libel herein, Amendment thereto, and Answer to Libel as Amended.

3. All of the Testimony and other proofs adduced herein before the Commissioner.

4. The Interlocutory Decree, Report of Commissioner, Exceptions thereto, and Final Decree in the cause.

5. The Notice of Appeal, Citation on Appeal, and Assignments of Error.

It is further stipulated and agreed that the appeal herein is taken pursuant to section 3 of Admiralty rule 4 of the Circuit Court of Appeals. If said Rule be held unconstitutional, or invalid for any other reason, then this Appeal shall be dismissed. If said rule be held or deemed to be constitutional, then the sole question to be reviewed by the Circuit Court of Appeals on said appeal shall relate to the value of the damaged coffee involved herein at the time of its delivery to libelants.

Dated, San Francisco, California, December 22, 1909.

PAGE, McCUTCHEN & KNIGHT,
Attorneys and Proctors for Appellant.

WILLIAM DENMAN,
Attorney and Proctor for Appellee.

[Endorsed]: Filed Dec. 23, 1909. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE and HASKINS,
Libelants,

vs.

The American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,
Respondents.

Statement of the Clerk of the District Court.

PARTIES.

Libelants: Thomas H. Haskins and Max Schwabacher, partners doing business under the firm name of Leege and Haskins.

Respondent: The American Steamer "Santa Rita," her tackle, etc.

Claimants: The United Steamship Company, a corporation.

PROCTORS.

Libelants: Mr. WILLIAM DENMAN.

Respondents and Claimants: Messrs. PAGE, McCUTCHEN and KNIGHT.

1907.

March 12. Filed Verified Libel.
Filed Libelants' Stipulation for Costs.
Issued Monition for Attachment of the

American Steamer "Santa Rita," etc., and which said Monition was afterwards returned and filed on the 13th day of March, with the return of the United States Marshal endorsed thereon.

13. Filed Claim of The United Steamship Company.

Filed Claimant's Stipulation for Costs.

Filed Admiralty Stipulation for the release of American Steamer "Santa Rita," etc., in the sum of $12,000.00, with the United States Fidelity and Guaranty Company, as Surety.

April 26. Filed Answer of the United Steamship Company.

May 2. Filed Amendments to Libel.

Sept. 30. The above-entitled cause came on for hearing on this day, in the District Court of the United States of America, for the Northern District of California, at the City and County of San Francisco, before the Honorable John J. De Haven, Judge of said Court. And which said cause was, after the several hearings, submitted to the Court for consideration and decision on the 14th day of October, A. D. 1907.

1908.

Jany. 24. Filed Memorandum Opinion, Order libelant recover damages sustained.

Further ordered cause referred to United States Commissioner Jas. P. Brown, to ascertain and report amount of damages sustained by libelant, but which said Order was set aside and cause referred to United States Commissioner Francis Krull, to ascertain, etc., on November 9th, 1908.

March 3. Filed Decree, determining liability for injury to cargo.

Nov. 9. Filed order setting aside Reference to Commissioner Jas. P. Brown, and referring cause to Commissioner Francis Krull.

1909.

June 3. Filed Report of United States Commissioner Francis J. Krull; amount of damage sustained by libelant, reported to be $7,963.54, interest on said sum at 6%, $1,112.24; total amount due libelant, $9,075.78.

Filed libelants' Exceptions to Report of Commissioner.

12. Filed claimants' Exceptions to Report of Commissioner.

Aug. 6. Filed Memorandum Opinion, overruling all Exceptions to Commissioner's Re-

port, and ordered said Report confirmed.

16. Filed Final Decree.

Sept. 28. Filed Notice of Appeal.

1910.

Jany. 27. Filed Assignment of Errors.

In the District Court of the United States, Northern District of California.

IN ADMIRALTY.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,

Libelants,

vs.

The American Steamer "SANTA RITA," her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interest Therein,

Respondent.

Libel in Rem for Damage to Cargo.

To the Honorable J. J. DE HAVEN, Judge of the United States District Court, Northern District of California, in Admiralty:

The libel of Thomas H. Haskins and Max Schwabacher, of the City and County of San Francisco, partners doing business under the firm name of Leege & Haskins, against the American steamer "Santa Rita," whereof Arthur B. Conner was and is Master, her tackle, apparel and furniture, and all persons

intervening for their interest therein in a cause of contract civil and maritime, alleges as follows:

I.

That libelants are informed and believe and upon said information and belief allege that some time in the month of October, A. D. 1906, Arbuckle Bros. shipped on board the said steamer, then lying at the port of New York, State of New York, to be carried and transported in said steamer to the Port of San Francisco, State of California, and delivered to the libelants at said port, ten hundred sixty-seven (1,067) bags of Santos coffee, weighing one hundred fifty-two thousand seven hundred sixty-four (152,764) pounds, the said coffee then being in good order and well conditioned to be delivered to libelants in like good order; and the said Arthur B. Conner, as said captain, received the said coffee aboard said ship and agreed to carry the same in said manner and condition and as a common carrier thereof to said port of San Francisco; that said steamer "Santa Rita" was owned by the United Steamship Company, a New Jersey corporation, and was chartered for said voyage by the Union Oil Company, a California corporation; that said Arthur B. Conner was the agent of both said corporations and of said ship in receiving said coffee; that said ship was on said voyage carrying goods as a common carrier by sea.

II.

That the said steamer "Santa Rita" did steam on the said voyage and did thereafter arrive at the port of San Francisco, and did there deliver to the libel-

ants the said coffee, but, as libelants are informed and believe and upon said confirmation and belief allege, not in the like good order as when delivered to the said ship, but, on the contrary, the said coffee when delivered to the libelants at the said port of San Francisco was badly damaged by contact with oil and water, which damage was inflicted upon the said cargo while in the possession of the said ship on the said voyage.

III.

That the injury to the said cargo so received on the said voyage is more than ten thousand ($10,000) dollars, and that libelants have been damaged in said amount.

IV.

That the said steamer "Santa Rita" is now within the port of San Francisco, Northern District of California.

V.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Court.

Wherefore, the libelants pray that process in due form of law according to the course of this Court in causes of Admiralty and maritime jurisdiction may issue against the said steamer, her tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court will be pleased to decree the payment of the damages aforesaid with costs, and that the said vessel may be condemned and sold to pay the

same, and that the libelants may have such other and further relief in the premises as in law justice they may be entitled to.

WILLIAM DENMAN,
Attorney for Libelants.

State of California,
City and County of San Francisco,—ss.

Thos. H. Haskins, being first duly sworn, deposes and says: That he is one of the libelants herein, and as such is authorized to verify this libel; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to such matters he believes it to be true.

THOS. H. HASKINS.

Subscribed and sworn to before me this 12th day of March, 1907.

[Seal] JOHN FOUGA,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Mar. 12, 1907. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

In the District Court of United States, Northern District of California.

IN ADMIRALTY.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,
Libelants,

vs.

The American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and all Persons Intervening for Their Interest Therein,
Respondent.

Amendments to Libel.

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States, for the Northern District of California:

Now come the libelants herein, and finding new facts set up in the answer of the United Steamship Company, claimant of the above-named steamer "Santa Rita," pursuant to Rule 51 of the Admiralty Rules of the Supreme Court of the United States, they file their amendment to the libel by them herein filed, adding thereunto and alleging as follows:

I.

That it is true that the coffee injured while carried by the said steamer "Santa Rita" as heretofore described in this libel was carried under Bill of Lading issued by and on account of said steamship, and that the copy of the Bill of Lading set forth in the answer

of claimant is a full, true and correct copy of said Bill of Lading, that long prior to the delivery of the said cargo in San Francisco, and prior to the receipt of the said injury by said cargo, Arbuckle Brothers, the person to whom the said Bill of Lading was issued and the consignee therein named, assigned, endorsed and set over the said Bill of Lading of libelants, and that libelants have ever since been, and now are, the owners and holders of the said Bill of Lading, and at the time of the receipt of the injuries by the said coffee were the owners of the said coffee.

WILLIAM DENMAN,
Proctor for Libellants.

State of California,
City and County of San Francisco,—ss.

Thomas H. Haskins, being duly sworn, deposes and says: That he is one of the libelants herein; that he has read the foregoing amendment and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to such matters he believes it to be true.

THOMAS H. HASKINS.

Subscribed and sworn to before me this 2d day of May, 1907.

[Seal] CEDA DE ZALDO,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 2, 1907. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

In the District Court of the United States of America, Northern District of California.

IN ADMIRALTY—No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Doing Business Under the Firm Name of LEEGE & HASKINS,

Libelants,

vs.

The American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, etc.

Claim.

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States for the Northern District of California.

The claim of United Steamship Company, corporation, to the American Steamer "Santa Rita," her tackle, apparel and furniture, now in the custody of the Marshal of the United States for the said Northern District of California, at the suit of Thomas H. Haskins and Max Schwabacher, partners doing business under the firm name of Leege & Haskins, alleges:

That United Steamship Company, a corporation, is the true and bona fide owner of the said American Steamer "Santa Rita," her tackle, apparel and furniture, and that no other person is owner thereof.

Wherefore, this claimant prays that this Honorable Court will be pleased to decree a restitution of

the same to it and otherwise right and justice to administer in the premises.

UNITED STEAMSHIP CO.,
By JAMES JEROME,
Secy.

———— deposes and says that he was and is the Master of said vessel, and that at the time of the said arrest thereof he was in possession of the same as the lawful bailee thereof for the said owner ——; that said owner —— reside —— out of the said Northern District of California, and more than one hundred miles from the city of San Francisco, in said District.

Northern District of California,—ss.

Subscribed and sworn to before me this 5th day of *thirteenth day of* March, A. D. 1907.

PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant.

JOHN FOUGA,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed March 13th, 1907. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

[Answer.]

In the District Court of the United States, Northern District of California.

IN ADMIRALTY.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,
Libelants,

vs.

The American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and all Persons Intervening for Their Interest Therein,
Respondent.

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States, for the Northern District of California.

The answer of United Steamship Company, claimant of the above-named steamer "Santa Rita," intervening for its interest in said vessel, to the libel herein of Thomas H. Haskins and Max Schwabacher, partners doing business under the firm name of Leege & Haskins, alleges as follows:

I.

That it is true that in the month of October, 1906, Arbuckle Brothers shipped on board said steamer, then lying at the port of New York, State of New York, to be carried and transported in said steamer to the port of San Francisco, State of California, to the order of said Arbuckle Brothers, and not other-

wise, and delivered to libellants at the port last named, ten hundred and sixty-seven (1,067) bags of green coffee, and not otherwise, weighing one hundred and thirty-eight thousand seven hundred and ten (138,710) pounds, and no more, but claimant is entirely ignorant as to the order and condition of said coffee, and each and every part thereof, at the time of said shipment, and therefore leaves libellants to their proof thereof.

II.

Claimant denies that said coffee, under the term of the contract of shipment, was to be delivered to libellants in good order and well-condition; and denies that the master of said ship, to wit, Arthur B. Conner, agreed to carry said coffee in the manner set forth in said libel, or in any manner or under any other terms or conditions than those set forth in the bill of lading, under which said coffee was transported as aforesaid, which bill of lading is here referred to and a copy thereof is hereunto attached and made a part hereof; and claimant avers that the said Arthur B. Conner received said merchandise on board of said steamer as master thereof, and as agent for either claimant or the Union Oil Company, a California corporation, as the interest of each may appear under a charter-party theretofore entered into between them and then in effect, and not otherwise.

III.

Claimant alleges that the coffee referred to in said libel, after being received on board of said steamer, was carried thereby from the said port of New York

to the said port of San Francisco under the contract of carriage hereinbefore set forth, and not otherwise, and that claimant is the sole owner of said vessel.

IV.

Claimant alleges that upon the arrival of said steamer at said port of San Francisco, said coffee was delivered to libellants, but claimant has no information or belief upon the subject sufficient to enable it to answer the allegations of the libel respecting the condition of said coffee at the time of its delivery as aforesaid, and therefore placing its denial on that ground it denies that at such time said coffee was badly or at all damaged by contact with oil and water, or either thereof.

On the other hand, claimant avers the fact to be that said coffee, if damaged at all, was damaged by a cause specified in said bill of lading as exempting said carrier from liability, to wit, from leakage, breakage, contact with other goods, and perils of the sea.

V.

Claimant has no information or belief upon the subject next hereinafter mentioned sufficient to enable it to answer the allegations of the libel in said behalf, and therefore placing its denial upon that ground it denies that the injury to the cargo hereinbefore referred to on said voyage is more than ten thousand (10,000) dollars, or is said sum or any part thereof, and denies that the libellants have been damaged in said amount or any part thereof.

Wherefore, claimant prays that the libel may be dismissed, with its costs in this behalf sustained.

PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant.

State of California,
City and County of San Francisco,—ss.

James Jerome, being duly sworn, deposes and says: That he is an officer, to wit, the treasurer, of the United Steamship Company, the claimant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

JAMES JEROME.

Subscribed and sworn to before me this 26th day of April, 1907.

[Seal] ROBT. J. TYSON,
Notary Public in and for the City and County of San Francisco, State of California.

[Exhibit to the Answer—Bill of Lading.]

SHIPPED in good order and condition by ARBUCKLE BROS. in and upon the Steamship called Santa Rita whereof is Master for this present voyage A. B. Conner or whoever else may go as Master in the said vessel, and now lying in the port of NEW YORK, and bound for San Francisco, Cal. One thousand & sixty-seven (1067) bags Green Coffee, S. Covers being marked and numbered as in the margin; and are to be delivered from the ship's deck,

where the ship's responsibility shall cease, in like good order and condition, at the aforesaid port of San Francisco (the act of God, the Kings enemies, Pirates, Robbers, Thieves, Vermin; Barratry of Master or Mariners, Restraints of Prince and Rulers, Loss or Damage arising from insufficency in strength of Packers, from Sweating, Leakage, Breakage, or from Stowage or contact with other goods, or from any of the following perils, whether arising from negligence, default, or error in judgment of the Master, Mariners, Engineers or other of the crew, or otherwise howsoever excepted), Namely: Risk of Craft, Explosion or Fire at Sea, in Craft or on Shore, Boilers, Steam or Machinery, or from the consequence of any damage or injury thereto howsoever such damage or injury may be caused, Collison, Stranding, or other perils of the Seas, Rivers, or Navigation, of whatever nature or kind soever; and howsoever such Collision, Stranding or other perils may be caused, with liberty, in the event of the steamer coming back to New York, or into any other port, or otherwise being prevented, from any cause, from proceeding in the ordinary course of her voyage, to tranship the Goods by any other Steamer and with liberty during the voyage to call at any port or ports, to receive Fuel, to load or discharge Cargo, or for any other purpose whatever, to sail with or without pilots, and to tow and assist vessels in all situations, unto San Francisco, Cal. or to owners or their Assigns, Freight for the said goods being paid, immediately on landing, without any allowance of credit or discount, at the rate of forty (40) cents per

hundred gross weight delivered with 5 per cent primage on average accustomed. IN WITNESS WHEREOF, the Master or Agents of the said Ship hath affirmed to one Bills of Lading, besides Captain's copy, all of this tenor and date, one which Bills being accomplished, the others to stand void.

Weights, Measures, Contents, Quality, Brand and Value unknown. The Goods to be taken from alongside by the consignee, immediately the vessel is ready to discharge, or otherwise they may be landed and warehoused at his risk and expense. The Collector of the Port is hereby authorized to grant a general order for discharge, immediately after the entry of the ship. The master Porterage of the delivery of the cargo to be done by the Consignee of the Ship, and the expenses thereof to be paid by the receivers of cargo. The owner of the ship will not be responsible for Money, Documents, Gold, Silver, Bullion, Specie, Jewelry, Precious Stones or Metals, Paintings and Statuary, unless Bills of Lading are signed therefor and the value thereof therein expressed.

In accepting this Bill of Lading, the Shipper or other Agent of the Owner of the Property carried, expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed. Sterling freight at the quoted short exchange on London, and Dollar freight Frcs. 5f. 25c. in Gold, to the Dollar. Dated in New York, Oct. 20, 1906.

FILLMORE CONDIT,

Agent.

Not Accountable for Weights, Marks, Decay, Breakage, or Damage by Rats.

Attention of Shippers is called to the Act of Congress of 1851.

"Any person or persons shipping Oil or vitriol, Unslacked Lime, Inflammable Matches, or Gunpowder in a Ship or Vessel taking cargo for divers persons on freight without delivering it at the time of shipment a note in writing expressing the nature and character of such merchandise to the Master, Mate, or officer or other person in charge of loading of the Ship or Vessel, shall forfeit to the UNITED STATES, ONE THOUSAND DOLLARS.

To the order of Arbuckle Bros.

Notify Leege & Haskins,

San Francisco, Cal.

Freight 138,710 at 40c £	$554.84
Primage	3.45
Total, £	$558.29

IT IS ALSO MUTUALLY AGREED, that this shipment is subject to all terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An act Relating to the Navigation of vessels, etc."

Admission of service of the within Answer and receipt of a copy is hereby admitted this 26th day of April, 1907.

WILLIAM DENMAN,
Proctor for Libelant.

[Endorsed]: Filed Apr. 26, 1907. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

[Findings of Fact and Conclusion of Law, etc.]

In the District Court of the United States, Northern District of California.

No. 13,639.

THOMAS H. HASKINS et al.,

Libelants,

vs.

The American Steamer "SANTA RITA" et al.,

Respondent.

Upon consideration of the evidence I find all of the allegations of the libel and the amendment thereto, to be true;

Second, that the damage to the cargo of coffee mentioned in the libel was not caused by leakage, breakage, contact with other goods, or perils of the sea, or any other cause specified in the bill of lading, as exempting the steamer "Santa Rita" from liability.

As a conclusion of law from the foregoing facts, I find that the libelants are entitled to a decree for the damages sustained by them on account of the matter alleged in their libel, and for costs.

The case will be referred to United States Commissioner Brown, to ascertain and report the amount of such damages.

Let such a Decree be entered.

Dated, January 24, 1908.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed January 24, 1908. Jas. P. Brown, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, Northern District of California.

IN ADMIRALTY.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,
Libelants,

vs.

American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,
Respondent.

Decree Determining Liability for Injury to Cargo.

The libel herein coming on duly to be heard, the libelants being represented by their proctor, William Denman, Esq., and the claimant, United Steamship Company, by its proctor, Charles Page, Esq., and Samuel Knight, Esq., and it being admitted at the hearing that the allegations of the libel as to the ownership of the cargo, its receipt by the vessel in good condition and its delivery in a somewhat damaged condition were true; and it being agreed that the question of the amount of the said damage, in the event that the steamer "Santa Rita" be held liable for the damage, should be referred to a commissioner, and evidence being introduced as to the liability of the vessel for the said damage; and the Court finding that the said damage was not caused by leakage, breakage, contact with other goods and perils of the sea, or any of them, as alleged in the answer, or at all;

Now, therefore, it is ordered, adjudged and decreed that the said American steamer "Santa Rita" and her claimant, the United Steamship Company, and the stipulators to the stipulation of claimant on file herein, be and are held liable to libelants for the damage received by the cargo of the said vessel on the voyage from New York to San Francisco as in the said libel described; and it is further ordered that the said cause be referred to James P. Brown, Esq., Commissioner of this Court, to hear testimony and assess the said damage; and it is further ordered that the libelants herein shall have their costs and interest on the amount of damage to said cargo from the time of the receipt of the said injury.

Dated March 3d, 1908.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Mch. 3, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States, Northern District of California.

IN ADMIRALTY—No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,
Libelants,

vs.

The American Steamer "SANTA RITA," etc., and All Persons Claiming any Interest Therein,
Respondents.

Order Substituting U. S. Commissioner.

It appearing that United States Commissioner James P. Brown, heretofore appointed Commissioner for the determination of the damages claimed to be suffered herein, will be absent from this District for an extended period,—

It is therefore ordered, that the appointment of said Commissioner be hereby set aside, and that Francis Krull be appointed as said Commissioner with the same powers herein as conferred upon the said United States Commissioner James P. Brown.

Nov. 9, 1908.

JOHN J. DE HAVEN.

[Endorsed]: Filed Nov. 9, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States, Northern District of California.

No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners, Doing Business Under the Firm Name of LEEGE & HASKINS,

Libelants,

vs.

The Steamer "SANTA RITA," etc.,

Respondent.

Report of United States Commissioner.

To the District Court of the United States for the Northern District of California.

Pursuant to the order of reference made in the above-entitled case, referring the same to the under-

signed as United States Commissioner, to ascertain and report the amount of the damage to which libelant is entitled, I have to report as follows: I was attended on the dates upon which the testimony was taken by William Denman, Esq., and Samuel Knight, Esq., of the firm of Messrs. Page, McCutchen & Knight, proctors for respondent, and the proceedings and testimony had and taken are hereunto annexed and made a part hereof.

The consignment of coffee upon which the damage is to be assessed herein, for which the steamer "Santa Rita" has been found to be liable, arrived at the port of San Francisco some time during the month of January, 1907, and was taken from the dock of the steamer's discharge on January 30, 1907, and within six or seven days thereafter, through the agency of a broker, sold as damaged coffee to a coffee jobber in San Francisco for 5¼ cents per pound, and within a week thereafter again sold by the purchaser to a coffee buyer in St. Louis for 6¾ cents per pound. A considerable expense was had in conditioning the coffee and preparing it for shipment.

Other coffee, a part of the same general cargo of the steamer, consigned to a coffee firm in San Francisco, and damaged from the same cause, was sold in San Francisco in the month of September, 1907, for six cents per pound.

It is contended by the respondent that the price of 5¼ cents per pound obtained for the damaged coffee, was inadequate; that a better price could and should have been obtained.

The market value of coffee damaged as this was is more or less speculative, and I am not satisfied from the evidence before me that reasonable exertions were not made to obtain the best price for this damaged coffee, and, in view of the testimony of the experts, I am not satisfied that the price for which it was sold, was not as good as could have been obtained. The broker who handled the coffee is one of standing and experience, and I find no reason to question the good faith of the transaction.

The price of 5¼ cents per pound is therefore taken as the basis in ascertaining the market value of this damaged coffee.

I find from the evidence that this coffee was what is known to the coffee trade as "Santos Coffee."

That the market value of "Santos" coffee in sound condition in the market of San Francisco, at the date of the arrival of the "Santa Rita" was 10½ cents per pound.

That the number of pounds of this coffee shipped in good order was 152,764 lbs., consisting of 1,067 bags.

That the total weight of said coffee delivered on account of this consignment was practically the same as the weight shipped.

As a conclusion from the foregoing findings of fact, I find the market value of this coffee in sound condition to be, (152,764 lbs., at 10½ cents per lb.) $16,040.22

The value of the damaged coffee, I find to be (152,764 lbs. at 5¼ cents per lb.) .. 8,020.11

$8,020.11

It is admitted that there was unpaid freight amounting to 56.57

$7,963.54

It appears from the evidence that coffee is sold in the market of San Francisco on a basis of 2% discount for cash, and that this coffee was sold on these terms.

As interest is allowed from the date of the injury to this coffee, no deduction is made for discount from the value of the damaged coffee.

From the foregoing findings of fact and conclusions therefrom I find, and do so report, the amount of the damage to which libelant is entitled to be $7,963.54.

The decree herein allows interest on the amount of damage from the time of the receipt of the injury.

I find and fix the time of the injury as January 30, 1907, the date of the delivery of said coffee, and the interest is found to be $1,112.24, which is six per cent on $7,963.54, from January 30, 1907, to and including the date of this report.

To recapitulate: The damage is ascertained and reported to be $7,963.54

The interest on this sum at 6% is found to be 1,112.24

Total, ... $9,075.78

All of which is respectfully submitted.

Dated, San Francisco, Cal., May 28, 1909.

FRANCIS KRULL, [Seal]

United States Commissioner, Northern District of California.

[Testimony Taken Before the United States Commissioner.]

In the District Court of the United States in and for the Northern District of California.

IN ADMIRALTY—No.13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners, Doing Business Under the Firm Name of LEEGE & HASKINS,
Libelants,

vs.

The American Steamer "SANTA RITA," etc.,
Respondents.

[Proceedings Had Before the United States Commissioner.]

PROCEEDINGS UNDER ORDER OF REFERENCE OF NOVEMBER 9, 1908, OF THE ABOVE-NAMED COURT TO FRANK KRULL, UNITED STATES COMMISSIONER FOR THE NORTHERN DISTRICT OF CALIFORNIA, TO TAKE TESTIMONY AND REPORT DAMAGES SUSTAINED BY THE LIBELANT, IF ANY.

On this, the 9th day of December, 1908, at 3 P. M. of said day, at the office of said Commissioner, appeared William Denman, Esq., proctor for libellants, and W. S. Burnett, Esq., representing Messrs. Page, McCutchen & Knight, proctor for respondents; whereupon the following proceedings were had:

[Testimony of E. H. O'Brien, for the Libelants.]

E. H. O'BRIEN, called for the libelants, sworn.

Mr. DENMAN.—Q. Mr. O'Brien, what is your full name? A. Edward H.

Q. What is your occupation?

A. Coffee broker.

Q. How long have you been in that business?

A. Well, I have been in the coffee brokerage business about eight years. I have been engaged in the coffee business for seventeen years.

Q. And how long have you been engaged in San Francisco?

A. For the entire seventeen years.

Q. Do you recollect in the spring of 1907 handling some coffee out of the "Santa Rita"?

A. I do.

Q. Do you recollect a particular lot—pardon the interruption. It was in the fall of 1906.

Q. And do you recollect receiving in San Francisco certain coffee from the steamship "Santa Rita" in the month of February, 1906, in a damaged condition? A. 1907; I do.

Q. What was done with that coffee? I am not referring to the Leege & Haskins shipment.

A. Immediately after its arrival, or after the vessel had begun discharging, I went to the dock at the request of some insurance company: I believe it was the New Zealand Insurance Company, the agents of this company were Parrot & Co. They were clients of our office as coffee importers. I went to the dock

(Testimony of E. H. O'Brien.)
and found that the coffee, or some of it, was badly damaged, the bags being swollen and badly oil stained, and smelled of a sort of crude creosote oil. I had preliminary samples which I took at the dock and which I brought to the office, and made sample roasts, and after the roasts had been made I made my usual cup tests and verified my judgment on the dock that the coffee was damaged, and badly damaged.

Q. Now, what was the nature of that damage?

A. It was an oil damage, and smelled of creosote and tasted with a flavor entirely foreign to a coffee flavor. In fact, there was not hardly the slightest semblance of coffee flavor in a drink after these roasts had been made.

Q. What was done with that coffee?

Mr. BURNETT.—Q. Of your own knowledge?

A. We were requested by the insurance company to sample and dispose of the coffee to the best advantage possible, and at the best possible price; and I advised that the best disposition we could make of that coffee, as soon as possible, would be the best course to pursue.

Mr. BURNETT.—I move to strike out that answer as not responsive to the question, and as being statements passing between other parties, which statements do not in any way bind us and cannot in any way bind the ship.

Mr. DENMAN.—Go right on.

A. I advised that it would be to the best interests of whoever it might concern to have the coffee taken

(Testimony of E. H. O'Brien.)

to a warehouse, dumped, aired and resacked, so that its original damage would not be visibly apparent, which was done; and then we sent samples to various sections of the United States where we have representatives—to New York, Chicago, Cincinnati, St. Louis, Kansas City, etc.; and to the best of my knowledge, drew only one bid. We made local efforts and sold it to a local buyer.

Q. Now, what did you sell it for?

A. I can't answer without consulting the books, as I don't know.

Q. Have you got the books with you?

A. No, I have not our salesbooks. I believe that Mr. Oliver can probably enlighten us on that subject as he knows that the coffee was sold to Mr. Lewin.

Mr. OLIVER.—It was sold on the 6th of February at 5¼ cents, first.

Mr. DENMAN.—Q. Do you remember sending me a sample of this coffee?

A. No, I don't recollect sending you a sample; but to the best of my knowledge that sample which you show me in the paper bag is the coffee.

Mr. DENMAN.—I now offer in evidence this sample of coffee just shown the witness.

Mr. BURNETT.—We object to the so-called sample on the ground that it has not been sufficiently identified.

(Marked "Libelant's Exhibit No. 1.")

Q. This bag, Mr. O'Brien, marked "Libelant's Exhibit No. 1," can you tell whether or not that

(Testimony of E. H. O'Brien.)
coffee is the same or similar to the coffee that you sold as testified to?

A. I could testify for a positive fact that the sample which you now show me, the sample in the glass, is the coffee that we sold, because I have never tasted or smelled any other coffee in my seventeen years' experience like it.

Q. And this coffee in the glass is the same coffee that you show? A. Yes, sir.

Q. And was it infected in the same way at the time you sold it? A. Yes, sir.

Q. Now, sample the coffee. Do you detect an odor in it?

A. I have sampled it and have detected the damaged odor.

Q. It now has a damaged odor?

A. It now has a damaged odor.

Q. Was it in that condition at the time that you sold it? A. It was.

Q. Will you kindly test this coffee in the bag? First, I will offer the sample in the glass in evidence and ask to have it marked "Libelant's Exhibit No. 2." (So marked.)

A. The odor has gone off of this bag sample to a very perceptible degree, but it is still damaged coffee. It still smells of what we have termed with regard to that coffee as a creosote smell.

Q. Have you tasted the berry from that bag?

A. No, you can't tell with any degree of satisfaction by tasting a green berry, as to what the coffee would drink like or taste like when roasted for manu-

(Testimony of E. H. O'Brien.)

facturing purposes. I could take a portion of this sample and would be willing to make a test of it and then testify as to its condition.

Q. Well, now, will you test one of those berries and see if you can detect the taste of oil or creosote?

A. Yes, markedly.

Q. What can you say of this coffee in this paper bag here, marked "Libelant's Exhibit No. 1," as to how it compares with the coffee you sold in February of last year, in regard to the amount of oil of creosote?

A. I would say that the sample in this bag smells nothing like as strong now as was the coffee that was sold; but would qualify that answer by saying that the first bean chewed from the bag gave very visible evidence, very forcible evidence, that the coffee is the creosote damaged coffee.

Q. Was the price at which you sold that coffee a reasonable price for that coffee in the condition it then was?

A. We thought it not alone a reasonable price, but an exceedingly attractive price; and I want to say that were it the owner's coffee or the purchaser's coffee or the insurance company's coffee or anyone else's coffee it would have met the same treatment and the same conscientious advice that was given to to the insurance company. We had the best interests of whoever was concerned, at heart, in the handling of that coffee.

Q. You say you made several tenders of the coffee before it was finally sold?

(Testimony of E. H. O'Brien.)

A. I made several tenders of the coffee before it was finally sold for account of the insurance company, and made several tenders of it afterwards for Lewin's account.

Q. Were you able to sell it for Lewin's account?

A. We did sell it for Lewin's account.

Q. When was it sold for Lewin's account?

A. On account of another receiver of coffee by that same steamer who also had coffee that was badly damaged, and who threatened to have the coffee condemned by the pure food authorities, we advised Lewin to ship the coffee out of the state, load it into cars and ship it out of the state without any destination in view, as we knew the coffee was unfit for use, several local manufacturers stating that it was absolutely of no value except as fuel. And we loaded it into cars, four or five carloads, and sent it over to the Southern Pacific tracks with instructions that the destination would be ultimately given.

Q. Who were the manufacturers that gave this opinion of the coffee here?

A. Folger, Schilling, Hills and several others.

Mr. BURNETT.—I move to strike out the opinions of the manufacturers on the ground that it is pure hearsay.

Mr. DENMAN.—Q. Did you offer this coffee to these various parties. A. I did.

Q. And they refused to buy it?

A. They refused to have anything to do with it.

Q. At any price? A. At any price.

(Testimony of E. H. O'Brien.)

Q. How many pounds of that coffee were sold? Do you know?

A. I can't answer except approximately. I should think that those bags weighed about 130 pounds apiece. That variety of coffee generally does.

Q. You have those weights in your books, have you not? A. Yes, sir.

Q. Can you show those books to Mr. Burnett if he wants to examine them? A. Yes, sir.

Q. What was the sound value of this coffee in San Francisco at the time you sold it in its damaged condition?

A. The sound value of that coffee at the time of its arrival in San Francisco would have been approximately eleven cents.

Q. Now, you say that you made various attempts to dispose of the damaged coffee, and ultimately it was shipped out of the state. Did you see that coffee afterwards in the warehouse?

A. Yes, I kept a man there for 4 or 5 days overseeing the coffee as it was taken from its original sacks, and the worst portion skimmed off, the coffee that was worst damaged skimmed off. I saw it every day and made probably in all fifty tests, cup tests of it.

Q. Do you know where that coffee is, now?

A. Yes, that very coffee is in existence now in a warehouse in St. Louis.

Q. Now, did you see it in this other warehouse that you speak of, in St. Louis? Did you see it there?

(Testimony of E. H. O'Brien.)

A. I was told by our broker there and by the man who bought it that he had no idea of how badly it was damaged, but he had found out after repeatedly trying to use it and sell it—after repeatedly trying to sell it to what he termed the nigger trade in the southeast.

Mr. BURNETT.—I move to strike out all that last answer as being irresponsive to the question and being pure hearsay, and ask counsel to caution the witness not to give us such wild assertions as that.

The WITNESS.—Well, I didn't go to the warehouse to see the coffee in St. Louis any more than I see one lot in one thousand lots of coffee received by me in San Francisco. But in substantiation of my contention that we had done our utmost to get the most attractive price for the coffee I will say that to my positive knowledge within the last five months the coffee is almost intact. It has never been used.

Cross-examination.

Mr. BURNETT.—Q. The whole lot?

A. Yes.

Q. How do you know where the coffee is at present? You say you know of your positive knowledge. Did you see it? A. No.

Q. Did you examine it? A. No.

Q. Did someone tell you it was?

A. Yes, sir.

Mr. BURNETT.—I move to strike out the answer of the witness to the effect that this coffee is now in existence.

(Testimony of E. H. O'Brien.)

The WITNESS.—I could only answer by saying that our representative whom we have never known to mislead or lie to us has advised us to that effect.

Q. Now, who first spoke to you about sampling this coffee, Mr. O'Brien?

A. The manager of the Marine Department of the Canton Insurance Co., I have since learned. I don't recollect his name. He was in the employ of Parrott & Co.

Q. Are you in the coffee business on your own account or in the employ of someone?

A. At the time of that sale I was—

Q. At the time of sampling the first lot?

A. At the time of the sampling I was associated with C. E. Bickford in business. Since that time through his death I have fallen heir to his business.

Q. Mr. C. E. Bickford was a local coffee man?

A. He was at the time. He was a coffee broker.

Q. Who pointed out to you the lot of coffee from which you took samples?

A. Who pointed it out?

Q. Yes?

A. I don't recollect the man's name. He seemed to be a sort of superintendent on the dock. I went down there in an automobile in company with the superintendent, or at least the manager of the Canton Insurance Co., and the coffee was spread out all over the dock. There were various samples taken from various bags and the bags that showed, in some instances, the least damage, outwardly, seemed to be the worst in the test.

(Testimony of E. H. O'Brien.)

Q. Was this one lot of coffee that you have described, or which has been described as the Leege & Haskins coffee on the dock at the time, or was there other coffee? A. There was other coffee.

Q. Where were your samples taken from?

A. From the sacks on the dock.

Q. From throughout the entire dock you took samples, from the coffee as it laid on the dock?

A. Yes; I took a trier from many bags; drew them in the presence of the insurance man and in Mr. Haskins' presence, as he rode down to the dock with us, and then made the tests on the roasted samples, not on the green samples, as you could not determine with any degree of satisfaction how much damage there was, or what the damage was until the roasted tests were made.

Q. Just please confine yourself to the question.

A. Yes, sir.

Q. How do you know that the samples you took were from the Leege & Haskins coffee? Who told you?

A. All coffee is branded with some initials or marks. I made the sale originally from Arbuckle Bros. to Leege & Haskins and our contract read that the coffee was marked "J. N. J." That same mark was on the bags that were on the dock.

Q. Then you were satisfied in your mind that you got samples of the Leege & Haskins coffee only? Is that right? A. Yes.

Q. Did you sample any other lots of coffee than the Leege & Haskins coffee? A. I did.

(Testimony of E. H. O'Brien.)

Q. I mean coffee that was on the mail dock at that time?

A. It was not on the mail dock. I don't know what they do call that dock—the little mail dock.

Q. Anyhow, on the same dock on which the Leege & Haskins coffee was situated, you took samples of other coffee that had arrived out of the "Santa Rita"? A. One other lot.

Q. One other lot?

A. Yes, that we were also interested in having sold.

Q. What other lot was that?

A. That was received by A. Schilling & Co.

Q. Did you keep the Schilling samples separate from the Leege & Haskins samples?

A. Yes, sir.

Q. Now, what was your method of sampling that coffee? How did you select the samples?

A. There is a regular steel trier, and you stab the bag with a punch of the bag, and the coffee runs out, runs through into the sample paper bag. I took along such samples as this. (Referring to Libelant's Exhibit No. 1.)

Q. Now, when you came to roast the coffee how did you do? Did you mix the samples you have described? Did you mix the samples of one paper bag with another, or did you maintain the integrity of each paper bag in making the roasted tests?

A. We made various roasts of the various samples drawn—I should say 20 different roasts, individual roasts—drawn from 20 different bags of the

(Testimony of E. H. O'Brien.)

coffee, and made our tests from those samples. We made 20 tests for the coffees from each bag—of the samples drawn.

Q. You didn't make any general sample by putting them all together?

A. Not on the first day that the samples were tested.

Q. Did you ever do it? A. Oh, yes.

Q. Afterwards? A. Afterwards.

Q. You made a general mixture, in other words, of all of the samples?

A. I made a general mixture of all of the samples.

Q. And then you roasted and made a test of that?

A. Yes, sir.

Q. Now, how many bags—you said you had about 20 bags, paper sacks?

A. Yes, sir; on the first day of the sampling.

Q. Well, what other sampling did you do?

A. After the coffee had been hauled to the warehouse and dumped into a pile of several hundred bags I went around and drew samples from several sides of the pile, so as to take an average, and as true a sample as possible.

Q. Now, was there any other coffee expert with you at the time you drew those samples, when you were on the mail dock, when the coffee was on the little mail dock?

A. No, I sampled all the coffee personally in only a preliminary way. The thorough sampling was done by a sampler who has been in the employ of our office for 12 years, and he does that work exclusively.

(Testimony of E. H. O'Brien.)

Q. My question was whether anyone else was with you on the first day's sampling—any other coffee sampling expert? A. No one else.

Q. Was there anyone representing the steamer there, the "Santa Rita," at the time you drew those samples?

A. Yes, the superintendent of the dock, or he seemed to be the superintendent of the dock; a sort of an over-clerk who had charge.

Q. He was not an officer of the steamer, was he?

A. No, sir.

Q. He was the man in charge of the dock?

A. He was the man in charge of the dock.

Q. Under the Harbor Commission?

A. Whether he was under the Harbor Commission or not I don't know, but he seemed—he asked me by what right I was taking samples of the coffee.

Q. What did you tell him?

A. He was acquainted with the insurance man who was with me, and he told him that I was there in the interests of the insurance company, and that was all right for me to draw samples of the coffee.

Q. Was there anyone who claimed to represent the steamship company there at the time when you were taking samples on the dock, other than yourself and this superintendent?

A. To the best of my memory there was another party down there, and I believe his name is Kpoitz.

Q. Did he sample the coffee? A. No.

Q. Is he a coffee man, if you know?

A. I don't know whether he did or not; whether

(Testimony of E. H. O'Brien.)

he was simply a clerk on the dock. He evidently had business on the dock, because he as well as others seemed interested in that sampling proceeding.

Q. You don't know whose interest he represented? A. No.

Q. And then after the coffee was in the warehouse—it was then that you made a thorough sampling and test, or caused it to be made, wasn't it?

A. No, prior to its arrival in the warehouse I sent our sampler down to the dock to draw a large and true average sample of the coffee, and that was the sample brought to the office, on which our efforts to sell it were made.

Q. Did you do anything with the samples that you drew the day that you went down?

A. Yes, they were used principally for roasting and testing.

Q. And it was the sampling that was done subsequently that you made a general sample of?

A. It was the sampling that was done subsequently that I made a general sample of, and sold on.

Q. You don't know anything about that yourself, as to the taking of those samples on which that sale was made?

A. No, I didn't go down personally to draw the subsequent samples.

Q. (By Mr. DENMAN.) Is that man still with you? A. Yes.

Q. What is his name? A. Falkinham.

Q. What is his first name?

(Testimony of E. H. O'Brien.)

A. Joseph Falkinham.

Q. (By Mr. BURNETT.) And it was on those samples that the sale was made? A. Yes, sir.

Q. And it was on those samples, I suppose, that you have based your opinion as to the condition of the coffee?

A. On those, and on the samples that I drew personally, and on the opinion that I formed originally. My original opinion was formed on the samples that I drew myself.

Q. But you didn't consider those sufficient to enable you to draw a true conclusion as to the condition of the coffee, did you—the first samples?

A. No, because I couldn't take the time to sample individually some thousand bags of coffee. That would have required several hours work, and I don't believe my stay on the dock was more than ten or fifteen minutes.

Q. And that extensive sampling was necessary to enable you to determine how much the coffee was damaged? A. It was.

Mr. BURNETT.—We make the formal motion here to strike out the testimony of this witness as to the condition of the coffee, it appearing now that the tests that were made were made from coffee which has not been identified as that involved in this action.

Redirect Examination.

Mr. DENMAN.—Q. Mr. O'Brien, did the results of the large sampling confirm the opinion which you had gathered from your first personal sampling?

(Testimony of E. H. O'Brien.)

A. Yes, thoroughly so.

Q. When this coffee was subsequently offered to those wholesalers that you have spoken of, did they themselves sample the coffee?

A. Not to my knowledge, as they have always been satisfied with our samples—the truth of our samples.

Q. And you tendered them your samples?

A. Yes.

Recross-examination.

Mr. BURNETT.—Q. Do your books show the tests that you have described as having been made in your office?

A. No, we keep no record of tests made, for the reason that in a year's time there are several thousand lots of coffee handled, graded and sold by our office. We could not very well keep a record of all the tests. A test is made and the results are given to the prospective buyer, and we have no further use for it.

Q. Do you deal in damaged coffee?

A. We deal in any kind of coffee that is given to us whereby we can earn a percentage.

Q. Well, now, had you ever dealt in creosote—so-called damaged creosote coffee, before?

A. That is the first—no, it was not the first. We had had previous experience with damaged coffee, creosote damaged coffee, if you care to call it that.

Q. Well, now, let me ask you: in the samples that you took did you find any actual contact of the creosote with the coffee, or was it just the fumes?

(Testimony of E. H. O'Brien.)

A. Some bags were in actual contact with oil of some kind.

Q. What proportion, if you know, of the Leege & Haskins shipment showed actual contact?

A. I don't know, because I had no way of ascertaining from the bags. The bags were piled five or six bags high on the wharf and then solidly backed up against the side of the wharf, and I could only see the tops of the bags and the outer tier.

Q. And of course your selection of samples was limited to what you could see, I suppose?

A. Limited to less than I could see. I didn't sample every bag I could see.

Q. What was the other experience you had with creosote coffee?

A. Some years ago one of the Pacific Mail steamers—I don't recollect the name—in order to preserve the woodwork over the side of the vessel had put some wood preservative on the side of their vessel, or the hull of their vessel, and it had not properly dried, and it affected the coffee. It was also sold as damaged coffee.

Q. Now, to whom did you make tenders of this coffee?

A. To almost every dealer in San Francisco who we thought could possibly handle it.

Q. Who would those be?

As I don't know what you think.

A. There are only about six coffee houses in San Francisco that are large enough to handle a thou-

(Testimony of E. H. O'Brien.)
sand bags of coffee at a time. That would be McCarty Bros., J. A. Folger & Co., Brandenstein & Co., A. Schilling & Co., and Leege & Haskins, and Lewen.

Q. And you finally sold to Lewen?

A. We finally sold it to Lewen; as I have learned by many years' experience that Lewen is about the only buyer, or is the only buyer in San Francisco who will handle damaged or fermented coffees.

Q. Then your tendering it to those other people was more formal than anything else?

A. More to enlighten us as to about what it was worth, and in order to form an opinion as to what we could get for it.

Q. You didn't feel, then, that you knew what the coffee was worth, or the extent of its damage?

A. We knew it was worth only what we could get for it; and we believed we had as good facilities as anyone for obtaining its worth.

Q. Then there is really not much point in saying that you either got a good price or a bad price, is there, if it was simply up to some fellows to offer you what he wanted and you would take it?

A. The buyer of the coffee, Mr. Lewen, after making the bid made an effort to withdraw it—

Q. Confine yourself to the question, please. (Question read.)

Mr. DENMAN.—I submit that the answer is as definite a one as can be given to a question of that kind. The question itself is vague and indefinite, and an answer can only be given in the way of a general explanation. (Answer read.)

(Testimony of E. H. O'Brien.)

The WITNESS. (Continuing.) —while I was in the act of tendering his bid to the insurance company; and they made a personal visit to our office to intercept me before I got to the insurance company; and I told him I could not do it inasmuch as it had been submitted and was under consideration.

Mr. BURNETT.—I move to strike out the answer as irresponsive to the question, and as incompetent, irrelevant and immaterial.

Q. What efforts did you make outside of San Francisco to sell this coffee?

A. I sent samples of the coffee to Portland, Seattle, Los Angeles, New Orleans, Kansas City, St. Louis, Chicago, Cincinnati and New York.

Q. That was after you had sold it to Lewen? You were not then acting for the insurance company when you did that?

A. I sent them out immediately for account of the insurance company, or for account of whom it might concern.

Q. As a matter of fact, that sale to Lewen was closed, wasn't it, long before you could have heard from this correspondence?

Mr. DENMAN.—I submit that that is entirely irrelevant; because the question is not to whom he sold it, but what was the market for it.

Mr. BURNETT.—I propose to show by this line of examination that there was no effort made to get the best price; that Lewen was the only person in San Francisco who dealt in it; that that was well known by Mr. O'Brien, who had to accept any of-

(Testimony of E. H. O'Brien.)

fer Lewen chose to make for it, and then sell it, it may be, later on. I don't know anything about that. Answer the question. (Question read.)

A. I positively can't answer that question, because I would be solely dependent on memory; and at that time I was acting on the instructions of Messrs. Parrot & Co., who were the agents of the insurance company, and who had the additional advice of a Mr. Noldecke.

Mr. BURNETT.—I object to that as not responsive to the question.

The WITNESS.—I have to give it that way.

Q. Now, I have asked you a straight question as to the date of that sale. If you don't know, all you have to do is to say so.

A. I don't know the date of that sale.

Q. Do your books show the date of that sale?

A. Yes.

Q. Will you produce the books here, showing the date of the sale to Lewen? (The witness inquires of his office by telephone.)

A. I have learned by phone that it was the 6th of February.

Q. When did you send out samples to all these other cities in the United States? Do you know?

A. I would have to look on the sample memorandum to see when those samples were sent.

Q. You keep a record, don't you?

A. Yes, I do until such time as all the samples on that particular sheet would be sold; after which they would be destroyed or thrown away.

(Testimony of E. H. O'Brien.)

Q. Do you know the date you sampled this coffee? Do you know the date of your visit down to the dock?

A. No, it was a day or two after the arrival of the steamer, or a day or two after the arrival and discharge of the steamer.

Q. When was that?

Mr. OLIVER.—She discharged that coffee on the 30th of January, 1907.

Q. (By. Mr. DENMAN.) How did you send those samples? By mail?

A. Either mail or express.

Q. (By Mr. BURNETT.) There were just a few days intervened, then from the time you took these samples down at the dock to the time the sale was closed to Lewen first? A. Yes.

Q. A very few days?

A. Then the intervening time was seven days; from the 30th of January to the 6th of February.

Q. You acted as Lewen's brokers afterwards, didn't you?

A. After he had purchased it, yes.

Q. You have your record showing the sales?

A. We, in conjunction with others, acted as Lewen's brokers. He had two others working on the coffee, besides ourselves.

Q. Well, your records will show, will they, any sales that were made of this lot of coffee for Lewen's account? A. Yes, sir; they would.

Q. You will produce those records, will you, if we should desire?

(Testimony of E. H. O'Brien.)

A. That will depend on whether it was compulsory or not. If not compulsory I would have to ask the privilege of the seller of the coffee, Mr. Lewen.

Q. Did you sell any considerable proportion—or what proportion—we will put it that way—what proportion did you sell of Lewen's coffee afterwards?

A. To the best of my memory we sold it all for Lewen's account, as it was all loaded and had to be sold as a whole, in the cars. It was en route somewhere as a whole thing.

Q. And did it all go to St. Louis, do you know?

A. Yes; at least I had instructions to ship it to St. Louis.

Q. Do you know what price it was sold at?

A. I would only answer that question under compulsion, or with the privilege accorded by the seller of the coffee.

Q. (By Mr. DENMAN.) Do you recollect at the present moment what it was sold for?

A. No, I do not. I recollect within a quarter of a cent what it was sold for. If you have no objection to the question being answered, I can see no particular harm in answering it.

Mr. DENMAN.—I have no objection.

The WITNESS.—It was sold at approximately one-half a cent a pound profit to him.

Q. (By Mr. BURNETT.) A half a cent a pound? A. Yes, sir.

Q. And how soon after it was purchased by him, if you know, roughly speaking?

(Testimony of E. H. O'Brien.)

A. It was sold within two weeks, while it was en route from—if my memory serves me correctly the Southern Pacific Co. asked us to give them positive instructions where to send it, and for that reason he accepted the only offer that was made on the coffee; and never subsequently was there any other offer made, from any direction.

Q. With Mr. Lewen's consent I suppose you will be willing to produce any record you have in your office bearing on this sale?

A. Yes, I would like to add at this time, so as to make my statement a truthful one, that that half cent profit, or approximately half a cent advance was excluding—it was about a net half a cent advance to him; because it seems at that time the Haslett Warehouse Co. made very, very excessive charges to him. They had to take the coffee to some building that was almost empty and spread and air it, and furnish additional bags and additional help that was out of the ordinary transactions, and there was additional speed required; so that they worked, I believe, day and night in their efforts to get the coffee out of the state, for fear it would be condemned; so that those charges were most excessive to him. I think the advance was about a cent over the cost to him, excluding the charges.

Q. You don't recollect what the gross price was on the coffee?

A. I think the gross price was either 6¼ or 6½ cents; but I knew at the time that he made about a half a cent.

(Testimony of E. H. O'Brien.)

Q. There was that much made?

A. Yes, he figured that he made about a half a cent.

Q. (By Mr. DENMAN.) That was after this complicated process had been gone through with?

A. Yes.

Q. In other words, the coffee was in an entirely different condition from the condition in which it was when it was sold to Lewen?

A. Oh, yes, the worst of it was taken out. It was put into several different lots of coffee—different grades.

Q. Then that half cent was the profit for handling it in the way that you describe? A. Yes.

Q. Mr. Lewen is an old coffee man?

A. Oh, yes, he is a coffee dealer—jobber.

Q. He added his experience and skill to the handling of the coffee before the additional price was realized?

A. Yes, and the additional risk that there was in handling that kind of coffee.

Q. You said 5¼ cents a pound was a fair price for that coffee when you sold it. Do you still hold that that was a fair price for the coffee, in that condition? A. I do, most emphatically.

Q. Now, taking into consideration the condition of the coffee market since that time, what is your opinion as to the price 5¼ cents for the coffee at that time?

A. It is my opinion that five cents could not be obtained for the coffee to-day.

(Testimony of E. H. O'Brien.)

Q. (By Mr. BURNETT.) Was not the market price the same otherwise for coffee—I mean not damaged coffee?

A. I could not say. I don't know. I think the market price is somewhat lower.

Q. (By Mr. DENMAN.) Enough lower to make any considerable difference?

A. Not in that kind of coffee, because having made efforts, and unsuccessfully, to sell that coffee, why, there is more enlightenment with reference to that coffee now. I am free to admit that with regard to those damaged goods, we were more or less groping as to its true worth; and with reference to a damaged article I have always found that the thing to do is to obtain the best price you can for it.

Q. Now, in view of all your knowledge of the coffee that you have from its subsequent history what would you say its value was on the day that it arrived at the dock?

A. In the condition that it was?

Q. In the condition that it was. I am not asking now the price you sold at, at that time, because as you say, it was speculative, to a certain extent, what the damage was. But now knowing what the damage was, if you were offering it for sale on the market then, with the knowledge you have now, what would you think the coffee was worth at the time it was placed on the dock?

A. If I had a bid to-day for the coffee, knowing the coffee and its condition, and what the possibilities of sale for it were, if I had a bid for the coffee

(Testimony of E. H. O'Brien.)

to-day of anything approximating five cents, I would recommend the acceptance of it.

Q. Would you consider that a fair bid?

A. I would consider that a fair bid.

Q. A fair value of the coffee?

A. Yes, more than a fair value of the coffee, as I don't believe that bid could have been obtained elsewhere.

Q. That is, five cents? A. Five cents.

Q. This party who finally bought the coffee of Lewin, did he see the coffee?

A. He saw a sample of the coffee.

Q. Here or where?

A. We sent it on. We sent over a pound or two pounds of the coffee as a sample to a broker in St. Louis who represents us, and he took it to his various buying acquaintances, the various people to whom he thought he might be able to sell it, and ultimately succeeded in selling it to a buyer there.

Q. You say that one thing that operated on the minds of the sellers at that time was the fear of the condemnation of the coffee, and you said there was some person moving to procure condemnation for the purpose of depreciating the value of the coffee for insurance purposes. Did I understand you correctly in that?

A. You understand me correctly. According to the form of their insurance policies they had to show that it was a total loss, and they believed—

Mr. BURNETT.—I object to his stating what somebody else's belief was.

(Testimony of E. H. O'Brien.)

Mr. DENMAN.—The purpose of this evidence is to show that there was reasonable ground for an attempted rapid disposition of the coffee; and for that purpose I desire to show what information came to these persons.

Mr. BURNETT.—What persons?

Mr. DENMAN.—The persons selling it.

Mr. BURNETT.—For the insurance company.

The WITNESS.—The broker.

Mr. DENMAN.—The information that came to the broker who was negotiating the sale. Go on, Mr. O'Brien.

The WITNESS.—The coffee was brought in to our office, and in our efforts to sell it I ran across Mr. Hiram Knowles, who was acting, I believe, for the Boston Insurance Co., and he had some coffee on either that steamer, either the "Santa Rita" or another steamer that came in with the same kind of damaged coffee, oil damage—no, I guess it was on the "Santa Rita"; I am certain of that—to Brandenstein, and the policy as it read was an unusual form of policy; that the coffee must either be totally damaged or totally lost or they would not pay it. It had to be shown that the coffee was unfit for use. Several of those manufacturers here so testified, or were willing to testify so, and were agitating with the authorities to have all of that coffee dumped or destroyed so that they could collect the insurance; and we were governed to a very very great extent by that, fearing that his man would have seven or eight thousand dollars worth of property that he

(Testimony of E. H. O'Brien.)

would have been responsible for, destroyed, were they to succeed in having the coffee absolutely condemned as unfitted for use. Legal efforts were being made along those lines.

Q. Do you know who those coffee people were who were acting that way?

A. M. J. Brandenstein & Co.

Q. Anybody else?

A. No. A. Schilling & Co. would have done that, as they had the same form of policy, but their insurance company paid them in full and considered the coffee was a total loss. Any recovery they might have made at the time would have been considered salvage.

Q. This, I understand, is the information that came to you?

A. Yes, that was brought to us right along.

Q. (By Mr. BURNETT.) Well, did that information affect you one way or the other?

A. It did, to this extent: J. A. Folger & Co., who are one of the largest, if not the largest coffee roasters here—I went to him with Mr. Knowles, who was acting for the Boston Insurance Co., and he gave us a statement, a written statement, that to the best of his knowledge and belief that coffee was unfit for use, and was therefore valueless. That statement I believed, and in fact knew, that Brandenstein knew of, and could have used in furthering his cause to have the coffee destroyed, absolutely destroyed. The coffee by that time, or these 1062 bags, were Lewen's property, and as it was a specu-

(Testimony of E. H. O'Brien.)

lative deal on his part, recommended by myself as a possible chance of making something off of it. I didn't want to see him lose that amount of money on it. And therefore at Mr. Bickford's suggestion and recommendation the coffee was shipped so as to get out of the jurisdiction of the state authorities.

Q. (By Mr. BURNETT.) Well, that was all after it had been sold to Lewen, wasn't it?

A. Yes; the utmost speed was used. In fact, they were working night and day to get it out of the state.

Q. The agitation, though, had not reached any considerable extent until after the sale to Lewen, had it?

A. Yes, prior to the sale to Lewen. Brandenstein had employed his brother, H. U. Brandenstein, the attorney, to use his best efforts to get—

Q. Well, the net result of that scare was to cause it to be sold for less than it otherwise would have been sold for, was it not?

A. If I had a bid come from any section of the United States or from anyone, of five and a quarter cents I would have recommended its acceptance. Mr. Bickford had had many years more experience than myself, and he recommended that coffee to be sold. In fact, it was with his knowledge and on his recommendation that the coffee was sold at five and a quarter cents.

Q. Then the net result of your testimony is, as I understand it, that this scare really did not cut any figure in the price received in the sale to Lewen?

(Testimony of E. H. O'Brien.)

A. It did have some weight. Possibly it had weight. We had every reason to believe, and still believe, that the sale to Lewen was more that a good one, for account of whoever it might concern.

Q. Well, if there had not been that scare would you have thought you ought to have got more from Mr. Lewen, or not? If you had never heard anything about that? Do you think you could have got more than five and a quarter cents? Or did you consider that you were getting all that the coffee was worth?

A. If we never had heard anything about it we would have recommended the sale to Lewen at five and a quarter cents.

Q. Then I don't see how you figure that that scare had any effect in the price obtainable.

A. It made us feel just that much more elated over the successful sale, as we construed it.

Q. That is the idea. Is there ever in the market any considerable extent of coffee that is damaged by creosote?

A. No, there is not any considerable amount of coffee arriving in this market damaged by creosote.

Q. Is there in any market? A. No.

Q. Is it an unusual method, an unusual form of damage to coffee? A. A most unusual form.

Q. The consideration of the taint, and all that kind of thing, is a speculative one, is it?

A. It is.

Q. And people have not got the requisite experience by which they can calculate those things?

(Testimony of E. H. O'Brien.)

A. They have gotten a great deal of experience from this particular lot of coffee.

Q. Yes, but outside of that it is something new to coffee experts?

A. Well, not altogether. Well, not altogether, because they have experience drawn from lots of water-damaged coffees or other kinds of damaged coffees, and generally speaking, coffee is most sensitive, and retains a damage, no matter what process you might put it through, for an interminable length of time.

Q. (By Mr. DENMAN.) You said the coffee was sold for five and a quarter cents. Was that on cash payment or deferred payment? Or was there a discount for cash?

A. I can't say without looking up my records. It was not a deferred payment. Whether it was sold at five and a quarter for cash or subject to the usual coffee discount of two per cent for cash within ten days or two weeks.

Q. That you can discover from your books?

A. If I remember rightly the coffee was sold at five and a quarter cents on New York weights, and there was a loss of a thousand pounds or more on the coffee, that had fallen from the worst damaged bags that were rotten through the contact or coming in contact with oil, and was afterwards cleaned up in the hold of the vessel. I don't know whether it was cash or cash less two per cent.

Q. (By Mr. DENMAN.) Your records will show? A. Yes.

(Testimony of E. H. O'Brien.)

Q. (By Mr. DENMAN.) It was either two per cent off, or cash?

A. Yes, on New York weights.

Q. I think you have testified to 1067 bags. Do you recollect the number?

A. I believe I sold 1067. That is the memorandum that I have of it. But I believe what we sold to Lewen was 1062 bags.

Q. Is it not the fact that that memorandum that you have is the memorandum of the number of sacks that were shipped on the vessel, and not the number of bags that were sold to Lewen?

A. This is the number of bags that were sold from Arbuckle Bros. to Leege & Haskins.

Q. And not the number of bags that were sold to Lewen? A. Yes.

Q. Haven't you got the number of bags that you sold to Lewen? A. No.

Q. Haven't you got the number on your books?

A. I don't know as it was sold in bags or sold by the number of pounds that there was there. There was several hundred or a thousand pounds or more that was gathered on the wharf or in the hold of the vessel afterwards that there was some controversy with Mr. Oliver about, as to whether Mr. Lewen was entitled to it or not—to the ownership of it.

Mr. OLIVER.—He got it later. I gave it to him. I think I gave him 22 or 31 bags.

The WITNESS.—It was sold him on New York

(Testimony of E. H. O'Brien.)

weights, and he asked or contended that he was entitled to whatever coffee there was there.

Mr. OLIVER.—He made a demand for it.

Q. (By Mr. DENMAN.) Did you ever see that second batch? A. No.

Q. It was not sold at this sale to St. Louis?

A. No, I don't know whether it was or not. It seems to me that he mixed it up and sold it subsequently at four cents. I think we did sell it at four cents, and some other truck, too, like it; other damaged coffee. This Mr. Lewen is a junk-dealer. He buys anything that is damaged and that is sent to the dump. He is the only dumping ground that we have for that class of coffee.

Q. (By Mr. BURNETT.) This coffee you have testified would have been worth 11 cents if in sound condition at the time of its arrival?

A. Approximately; yes.

Q. Was that 11 cents straight or was some of it more than 11 cents and some of it less than 11 cents; or was it all straight?

A. That was all one lot of coffee, and it was worth approximately 11 cents, we sold that lot of coffee originally to Leege & Haskins for 9½ cents in New York. Ordinarily dealers figure that the difference between New York and San Francisco is one cent a pound. The freight rate is 90 cents; the rail freight rate is 90 cents. Added to that is the time in transit, which in this case was 60 days, or about 60 days. The interest would be one per cent of its value. The loss of weight on all coffees, whether

(Testimony of E. H. O'Brien.)

they come by rail, or steamer, is about another one per cent; sometimes as much as two per cent.

Q. The point I was getting at is this: Each bag of this coffee was of the same value as the other bags? A. Yes, it was one lot of coffee.

Q. (By Mr. DENMAN.) But that sale was made in New York some time in September, was it not?

A. Yes; September, 1906, I believe; about the 21st of September. It was made the 5th of September and shipped about the 21st of September.

Q. And the valuations you have given here of 5¼ and 11 cents are valuations of February, 1907?

A. Yes.

Q. And they are fair valuations, each of them, as you have testified heretofore?

A. That is our opinion.

(Further hearing continued to Saturday, December 12, 1908, at ten A. M.)

[Testimony of C. G. Cambron, for the Respondent.]

Wednesday, December 30th, 1908.

C. G. *CAMERON*, called for the respondent, sworn.

Mr. KNIGHT.—Q. Mr. Cambron, you are a coffee broker, are you not? A. Yes, sir.

Q. Doing business here in this city and county?

A. Yes, sir.

Q. How long have you been engaged in that?

A. In the brokerage business 17 years.

Q. And all kinds of coffee? A. Yes, sir.

(Testimony of C. G. Cambron.)

Q. I will ask you whether or not you handled or sold the coffee which came to this port by the steamer "Santa Rita" consigned to Brandenstein & Company in the year 1907? A. I did.

Q. What kind of coffee was that?

A. It was Santos coffee and Bogota coffee.

Q. At what time did you first take hold of that coffee? A. In February some time.

Q. Of that year? A. Yes, sir.

Q. Do you know about how much of that coffee was Bogota coffee and how much Santos coffee?

A. Yes, sir. The total lot of Brandenstein's coffee, the exact amount, was 760 sacks; a few bags more or less.

Q. Seven hundred and sixty sacks?

A. Some place around there.

Q. That is, Bogota?

A. It could be easily ascertained; I don't remember the exact number.

Q. I don't care for the exact number. Can you give it in percentage how much there was in Bogota?

A. There was probably about half of it that was Bogota coffee.

Q. Was about half Bogota and half Santos coffee?

A. Yes. I could give you the exact by looking it up, if it is necessary.

Q. Now, confining yourself to the Santos coffee, will you state whether or not you carefully examined that coffee, sampled it roasted it, tested it, and

(Testimony of C. G. Cambron.)

handled it in any way to determine the damage, if any, that it had sustained?

A. I sampled it and roasted it and tested it on numerous times, first on the wharf and afterwards in the warehouse. I sampled it thoroughly in my office, spent days on it, cupping it and experimenting with it, grading it according to its degree of damage.

Q. Where did you get that coffee from, from the Steuart Street Wharf?

A. Originally from the Steuart Street wharf, part of it, and the balance, I think, from the California Warehouse. Part of it had already gone into the warehouse when I sampled it.

Q. Taking the coffee market as it existed then, what was the value of Santos coffee in good condition?

A. Coffee of that kind in good condition would be worth from 9½ to 10½, according to grade, probably nearer the latter figure, from 10 to 10½.

Q. Now, state what damage, if any, that coffee had received, as far as you could ascertain from sampling it and tending it, etc., in the manner you have explained?

A. The Santos coffee had suffered to an extent of about 20 per cent.

Q. Now, did you buy or did you sell, as a broker, or otherwise handle that Santos coffee of the Brandenstein shipment? A. I bought it all.

Q. Yourself? A. Yes, sir.

Q. At what price did you buy it?

(Testimony of C. G. Cambron.)

A. Six cents, subject to the usual cash discount of 2 per cent.

Q. Of 2 per cent cash discount?

A. Yes, sir.

Q. Under what circumstances did you make that purchase, Mr. Cambron?

A. Well, what do you refer to in that word?

Q. I mean, was it offered for sale to the market generally, or how did you come to buy it?

A. That I could not say, whether they had offered it or not.

Q. I only want what you yourself know?

A. That I don't know—I did not offer it at all. When I was prepared to buy the coffee I went there and bargained with them, bargained with Brandenstein for the coffee.

Q. And purchased it for 6 cents less 2 per cent cash discount? A. Yes, sir.

Q. By the way, when was that; how long after February, or was it during the month?

A. I think that was in September, the first of September, approximately; it might have been late in August; I could not say positively.

Q. Are you familiar with the condition of the coffee market that has existed at this place in the month of February, 1907? A. Yes, sir.

Q. What was the condition of the coffee market at that time? A. Quite active.

Q. How did its condition compare with the market as it existed in the month of September, when you purchased this Santos coffee?

(Testimony of C. G. Cambron.)

A. It was, locally, very much more active in February, very much more active, owing to a failure of the usual crop to arrive on time from Central America; there was more or less a scarcity of coffee at that time owing to late arrivals from Central America, which made an active demand locally at that particular time.

Q. Was there such a demand in existence after the month of February for coffee?

A. Well, I could not testify as to that without going back over statistics to find out. Everything was moving along and I was moving along with it, but I can't remember the stages that it went through.

Q. Can you state how the market was in February as compared with the condition of the market in September?

A. I will state, as I stated a moment ago, it was very much more active, owing to the fact that there was a temporary scarcity of coffee, because the Central American coffee had failed to arrive.

Q. In your opinion, Mr. Cambron, what was the value of that coffee, I am referring now to the Santos coffee of the Brandenstein shipment—what was the value of that coffee in the month of February, 1907, the going market value, in the condition in which it was, upon its delivery from the ship by the ship?

A. I would state that there was probably 20 per cent damage from its presumptive value in its original condition.

(Testimony of C. G. Cambron.)

Q. So that would mean 20 per cent off from 9½ or 10?

A. Say from 10 to 10½. I cannot remember the various grades; I could not do it positively unless I went all through it again.

Q. Will you state whether or not there was a market then for coffee damaged as this coffee had been? A. Yes, there was.

Q. Now, you purchased it at 6 cents, I think you said in September? A. Yes, sir.

Q. In your opinion what was the value of that coffee at that time?

A. Well, I thought it was worth more.

Q. In or about the month of February, 1907, did you know of the sale of any damaged Santos coffee arriving from the "Santa Rita"?

A. Yes, I heard of it.

Q. When did you first learn of that sale?

A. Almost immediately after it happened, but I don't remember the date. I know it was immediately after it happened I was told of it.

Q. Was that coffee offered to you?

A. No, sir.

Q. Was any opportunity given to you to make a bid on that coffee?

A. No. I didn't know it was in existence until it was sold.

Q. Did you receive any sample of that coffee after its sale?

A. I had a sample of the coffee, I am not sure whether the sale was consummated then or not; it

(Testimony of C. G. Cambron.)

was all right at that period; I could not tell whether I received that sample after the sale or not. Probably the sample was given to me to look at after the sale had been made, I could not say whether it was before it was made or after it was made. The chances are that the transaction was already consummated, because I was very anxious to get hold of that coffee, and I know I could not get it.

Q. Was that the Leege & Haskins coffee?

A. Yes, sir.

Q. Was that Santos coffee?

A. That was Santos coffee.

Q. Will you state how the sample which you had of that Santos coffee compared with the Santos coffee in the Brandenstein shipment which you subsequently handled?

A. It was of the same general character.

Q. And worth about the same?

A. About the same.

Q. The sample was a fair sample?

A. It was a mixed sample. The lots were not segregated in the sample I received of the Leege & Haskins; it was all alike. I will state the Brandenstein coffee was just about the same grade; there was no great difference in these coffees. There were no low grades at all. They are coffees of about a class.

Cross-examination.

Mr. DENMAN.—Q. Mr. Cambron, you say that there was a regular market for damaged coffees in February, of that year. What do you mean by that? Were they quoted on the market?

(Testimony of C. G. Cambron.)

A. No, sir.

Q. What does that mean?

A. It means that they were for sale—if they were for sale they could have been very easily sold; there was an active demand for them.

Q. You received a sample, you say; from whom did you receive that?

A. From Mr. Oliver. I did not sample the coffee Mr. Oliver gave me.

Q. That is, Mr. Oliver who is here, the agent of the ship? A. Yes, sir.

Q. He gave you the sample about that date?

A. Yes. I could not state the exact date.

Q. That was about the time that the vessel arrived?

A. No, it was after the vessel had arrived.

Q. About the time the coffee was sold?

A. About the time it was sold. I think Mr. Oliver gave me the sample and told me the coffee had been sold. I cannot remember positively as to that.

Q. He told you it was a mixed sample?

A. Yes, sir.

Q. Do you remember how much it was?

A. How large a sample?

Q. Yes.

A. Probably 4 or 5 or 8 or 10 pounds; probably 7 or 8 pounds.

Q. You don't know where Mr. Oliver got that, do you? A. No, sir.

(Testimony of C. G. Cambron.)

Q. Are you quite certain that Mr. Oliver told you it was of the Leege & Haskins coffee?

A. Yes, sir.

Q. Or other coffee on the vessel?

A. It was the Leege & Haskins lot.

Q. Now, that is all you know about it. Just that that sample was showed to you?

A. I know very little about that sample; I only know that I had a sample handed to me and I was told what it was.

Q. Did you make any cupping tests of that?

A. Yes, sir.

Q. Why did you do that?

A. To find out about that.

Q. What did you want to find out?

A. I am interested in all coffee that comes in and I wanted to get hold of it if it was for sale.

Q. Of whom did you inquire to get hold of it?

A. Nobody but Mr. Oliver.

Q. Did you know in whose hands it was?

A. No, sir.

Q. Did you ask Mr. Oliver in whose hands it was?

A. I probably did.

Q. Did he tell you?

A. I could not say; quite likely he did.

Q. Why didn't you go and ask them if it was for sale?

A. There is an unwritten law among us that if a broker has coffee for sale another will not try to buy it from him.

(Testimony of C. G. Cambron.)

Q. Suppose you wanted to buy it from a broker yourself?

A. I would not have the privilege of buying it from the broker, under the circumstances; the broker is supposed to have that coffee for sale and no other coffee broker would try to buy it or interfere with him in any way; just so much so as one doctor would not interfere with another doctor's patients.

Q. Suppose you wanted to buy it yourself?

A. At that time I would probably would not have wanted to buy it myself because I knew so little about it.

Q. You didn't know much about it?

A. No, sir.

Q. Do you think you knew enough about the sample to know it came from that lot?

A. I would not have bought it without sampling.

Q. Now, when you said a little while ago you didn't know where the coffee was, would you like to refresh your memory before placing your testimony so—what did you refer to? I understood you to say that you wanted to get hold of the coffee, but you didn't know where it was, and for that reason you could not get it; I understood you to say later on it was probably in the hands of a broker and you could not get it. Was it because you didn't know where it was or because it was in the hands of a broker?

A. If that coffee was in the hands of a broker, and Mr. Oliver stated that such was the case, that would have settled it.

(Testimony of C. G. Cambron.)

Q. You said you were very anxious to get that coffee; you do remember some circumstances prevented your getting it. Now, which one was it?

A. I do not remember which circumstance it was.

Q. It might have been in the hands of a broker and you did not go after it on that account?

A. Yes, it is quite likely if it was in the hands of another broker I would not go near it, because there is an unwritten law if one broker has it another will not go near it.

Q. You did not want to buy it for yourself?

A. At that time?

Q. Yes. A. No, sir.

Q. You wanted to have a chance to place it on the market? A. Yes, sir.

Q. Did you have a customer for it?

A. Yes, sir.

Q. Who did you have?

A. I couldn't tell you that.

Q. You won't tell me that? A. No, sir.

Q. Did that customer know that coffee was in existence? Did he see any of those samples?

A. From the appearance of the coffee and my knowledge of the coffee I knew I would have a customer for it. I probably did not have any offer on the coffee, I certainly did not have any offer on the coffee, because I didn't know it was for sale. I would not look for a customer until I knew it was for sale. If the coffee had been on the market I know I would have been able to find a customer for it very readily.

(Testimony of C. G. Cambron.)

Q. How about the Brandenstein coffee, did you try to get that?

A. That was offered to me, I had possession of that.

Q. When did you have possession of that?

A. I had full knowledge of that coffee by being employed to sample it on the wharf.

Q. Who did you sell that to?

A. I bought it myself.

Q. When did you buy it, in September?

A. Either August or September.

Q. Why didn't you buy it before?

A. I could not, it was not for sale. I could not get any price on it; I could not get any definite understanding or find out who could fix the definite price; in fact, the matter was held up.

Q. Have you any of that coffee still?

A. No, sir.

Q. What did you do with it?

A. Disposed of it.

Q. To whom? A. I could not tell.

Q. Was it to a San Franciscan?

A. Part of it.

Q. Was there not a very serious oil damage to that coffee?

A. Portions of it was very serious, and some was not.

Q. Some serious and some was not?

A. Yes, sir.

Q. It depended on how exposed it was to the oil?

(Testimony of C. G. Cambron.)

A. I presume you are referring to the Brandenstein coffee. I know nothing about the other coffee further than its general character, that it was like the Brandenstein coffee, but the Brandenstein coffee I am thoroughly posted on; part of that coffee was very seriously damaged, and part of it was not.

Q. What in your opinion occasioned the difference between one and the other?

A. Well, it certainly was a matter of exposure on one hand, and the other was the difference in the kind of coffee; different coffees have a difference in susceptibility.

Q. Was there any difference between the susceptibility—as I understand you the Santos coffee was more susceptible?

A. No, on the contrary, the Santos coffee was less susceptible.

Q. Now, in the Santos coffee there was a variation; some was more injured and some less injured?

A. Yes, sir.

Q. There was a great deal of variation in that?

A. The variation in damage in the Santos coffee was very slight. The Santos coffee, I do not think varied more, in fact I demonstrated it by the sales that were afterwards made, that the damage in the Santos coffee would not vary more than 5 or 6 per cent; in some slight case it might be 10 per cent.

Q. At the end of that period when you sold that coffee, was there any noticeable aroma to it or had it lost it? A. No, it was there.

Q. Was there any taste in it?

(Testimony of C. G. Cambron.)

A. Yes, there was taste in it. Are you referring to the Santos coffee?

Q. Yes.

A. Yes, you will even find at the end of six or eight months there is still a little taste in it; but not any more—not a particle more or less than it did at first.

Q. It did not?

A. It had not changed a particle.

Q. Is that so?

A. It had not changed in six months; the coffee was identically the same as it was to start with.

Q. I didn't know that.

A. Not the slightest. It would not come off in a few years.

Q. How did it get in?

A. I don't know. Of course, coffee is very porous it is very much like a sponge, and it has a certain percentage of water in it, and as the climatic conditions change or by the heat it is exposed to in the hold of a ship, it will open up or close up and it will take in an odor very much more rapidly at one time than it will at another. It opens up. It is porous and it gets in there; once it is there it is there for all times; you can't get it out. I made all the experiments in the world to try to eliminate that flavor from the coffee, and I could not get it out.

Q. Well, do you mean to say that that was permanently damaged?

A. It was permanently damaged, damaged to a certain extent.

(Testimony of C. G. Cambron.)

Q. Now, you did not sell any of that damaged coffee in February of last year?

Mr. KNIGHT.—Are you referring to the Santos or Bogota?

Mr. DENMAN.—Santos.

A. I did not get hold of it to sell, until September.

Q. Till September? A. Yes, sir.

Q. You did not approach any customer on that subject because, as you say you did not have the coffee?

A. I did not have it in hand for him.

Q. So that all you know about there being a market for it is your belief that you could have found a coffee buyer for it?

A. Not on the Brandenstein lot. Between February and September I had that coffee in mind constantly and long before I succeeded in purchasing it. I don't remember at what period I had this matter settled, but I had that coffee all disposed of.

Q. Then on the Brandenstein lot you tried to get *find* a buyer or make a sale before you made a purchase of the coffee; that is what you did?

A. I had several in view.

Q. And when you had that sale in view you went around to Brandenstein and tried to buy the coffee?

A. I was trying to buy the coffee all the time.

Q. When did you first go to Brandenstein?

A. I did not go to Brandenstein at all; I did not know who had the coffee for sale. I notified Mr.

(Testimony of C. G. Cambron.)

Oliver that when the coffee could be offered definitely I wanted a chance to buy it.

Q. When did you notify Mr. Oliver?

A. I don't remember. I could not tell the date.

Q. Some time in July last?

A. I could not tell you; it might have been June. It is quite a period of time that that thing was hung up for.

Q. What warehouse was that coffee stored in, do you know?

A. In the California and in the Humboldt, I think it was.

Q. Who paid the storage on it?

A. I don't know.

Q. You didn't do that?

A. No, I didn't do it.

Redirect Examination.

Mr. KNIGHT.—Q. Mr. Cambron, you spoke of the difference in susceptibility of the different kinds of coffee to take in a foreign odor or fumes, or that would be affected by something that was extraneous to the coffee. Is there any difference between Bogota coffee and Santos coffee in that respect?

A. Well, the Bogota coffee was washed and the Santos was unwashed coffee. There is a difference between washed coffees and unwashed coffees as to susceptibility.

Q. The Santos is an unwashed coffee?

A. Unwashed.

Q. And the Bogota?

(Testimony of C. G. Cambron.)

A. The Bogota that came here was all washed, although they have washed coffees and unwashed coffees in every country. The coffee that is washed is always more susceptible than unwashed coffee; that is, it is much more porous and much more susceptible to damage and fermentation and mould and damage of every description.

Q. Do you know whether or not the coffee of which you received a sample, or rather, was the sample of coffee which you received a sample of washed or unwashed coffee?

A. It was unwashed coffee.

Q. It was an unwashed sample? A. Yes.

Q. Can you state what is and what was at that time the difference in the market value at this port of Bogota and Santos coffee? That is, Bogota unwashed and Santos washed?

A. Bogota washed and Santos unwashed?

Q. Yes.

A. I would have to speak of lots that came here.

Q. Assuming it to be in good condition?

A. For washed coffee—some washed coffees are not worth as much as others.

Q. I will speak of the ones that did come here.

A. There was probably a difference of 2 cents a pound.

Q. In favor of the—

A. In favor of the Bogota.

Q. How was this Santos coffee, damaged as you say this coffee was, commercially available?

A. How is that?

(Testimony of C. G. Cambron.)

Q. How was this Santos coffee, damaged as you say this coffee was, commercially available?

A. I don't understand.

Q. Would it be used by itself or would it be used in a mixture with other coffees?

A. Coffee slightly damaged as that coffee was, speaking of the Santos, would certainly only be used blended with something else; it would not be turned out straight; if it was turned out straight the damage would be perceptible, whereas if the coffee was mixed in with other coffees it would be lost.

Q. To what extent—of course, it would depend, I presume, upon the blend and character of the coffee it was blended with—but to what extent, could you say, generally, the damage of that Santos coffee would be noticeable, if at all, to the ordinary trade?

A. It would not be noticeable at all; no roaster would use it all.

Q. Were you prepared to purchase this Leege & Haskins coffee, about the month of February, 1907, if it was put upon the market through any other source than some coffee broker?

A. What is that?

Q. Were you prepared to market this Leege & Haskins coffee, Santos coffee if it was put on the market in or about the month of February, 1907, provided it did not go to some broker, in which case, I understand you said the unwritten law of your profession would prevent you from bidding on it—

(Testimony of C. G. Cambron.)

that is, if it did not go through the hands of some other broker?

A. I certainly should have made a try to get it; I should have made an attempt to get hold of it.

Q. I think you have given us what you consider your estimate of the value of it at that time?

A. Yes, sir.

Recross-examination.

Mr. DENMAN.—Q. You got 760 sacks of this coffee from Brandenstein? A. Yes, sir.

Q. You paid six cents, with two per cent off for cash? A. Yes, sir.

Q. And I understand you would have attempted to have gotten hold of the coffee in February if some other broker had not got it?

A. I got no opportunity for attempting to bid; I will simply make that statement, as I have said, that if I would have known about it I would have tried to have got hold of it, because I knew it was a good thing.

Q. You would not purchase the coffee yourself at that time?

A. I would have purchased it at that time if I had known there was any such attempt to sell it at such a price; I would have attempted or made any attempt to buy it at that price or more.

Q. Do I understand you to say that when a customer wants to buy coffee himself he won't go to another broker?

A. I said another broker in this market?

Q. You don't do it? A. No.

(Testimony of C. G. Cambron.)

Q. But you bought this from Brandenstein?

A. Yes.

Q. You are a broker in this market?

A. Yes.

Q. Now, as I understand it, at the time this coffee came in, you would have bought it in if you could have got it at a fair price?

A. Yes, sir.

Q. You would have taken it all?

A. Yes, sir.

Q. Do I understand you that because it was in the hands of another broker you would not buy it?

A. That would be the simple reason. If it was in the hands of another broker I would not attempt to.

Q. You would not buy it off another broker if you were buying it yourself?

A. I would not go near the other broker at all. The other broker having it in charge would put me out of it.

Q. Suppose you wanted to buy it yourself. Suppose you went to a coffee broker, and you became a coffee purchaser, do you mean to say that you could not under the rules of business in this town go and buy from another broker because you were a broker?

A. I would hesitate to do it; it would be a long time, sure. I don't think I would; I don't think I would go near him.

Q. Why not?

A. Because a broker having in charge that is supposed to be handling that coffee in the best way it

(Testimony of C. G. Cambron.)

can be handled; he is handling that coffee and trying to sell it, and I am in the same position myself with coffees at the present time, and I would not want another broker to come in and interfere with coffee business and get control of it.

Q. I am not talking about your getting control of this coffee to sell to somebody else. I am now talking about your becoming a purchaser of the coffee. Do you mean to say that you would not go and purchase coffee of another broker for yourself because there is some rule of trade that steps in the way of it?

A. Not necessarily so, but I can assure you I would not go near him and try to do it.

Q. Why not?

A. Because it might cause ill feeling with other brokers.

Q. If you should go and ask him to sell to you at a certain price how would that cause ill feeling on their part?

A. He would recognize the fact that I was stepping in and trying to interfere with the coffeee trade on his part. It is not customary for a broker to step in and buy coffee from him, a broker too.

Q. Then do I understand when a broker wants to buy for himself he will not go to another broker?

A. Yes.

Q. Where will he buy then?

A. He will let it alone.

Q. Then he would never buy?

A. Not under those conditions.

(Testimony of C. G. Cambron.)

Q. Not under those conditions?

A. Not under those conditions; he won't go to the other broker.

Q. How then would you buy coffee in San Francisco if you wanted to buy yourself, and the coffee was all in the possession of other brokers to sell?

A. I would not get a chance to buy it, unless a broker offered it to me of his own volition.

Q. Then I understand you to swear here that it is considered improper for a broker who desires to buy coffee for himself to go to another broker and ask him to sell at a certain or fixed price?

A. You are citing a case that seldom exists. A broker never wants to buy coffee for himself or purchase coffee for himself. That is an unusual circumstance.

Q. I know it is an unusual circumstance. That is it just exactly. I am asking you if there is any rule of the trade that meets that circumstance and that would prevent you from going to another broker and saying to him that you wanted to buy that coffee?

A. There is no rule, nothing but a delicacy on the part of one broker not desiring to interfere with what another broker is doing.

Q. How would that interfere, if you facilitated making the sale? How would that interfere with the other broker? Supposing the other broker was looking for a customer for that coffee; how would that interfere?

(Testimony of C. G. Cambron.)

A. It probably would not interfere with the making of the sale.

Q. Why didn't you go to the broker and say "I will buy it from you"?

A. At this period I am not sure whether I received the sample, as I testified earlier in the case. I am sure, quite sure, that when he gave me that sample Mr. Oliver told me it was already sold; I think you will find he will so state. I do not remember at this time, but I think at the time Mr. Oliver handed me the sample the sale was already consummated.

Q. Then all this talk about delicacy between brokers is mere piffle. The truth of it is the reason you did not go after that coffee was it was probably all sold?

A. No, it is not piffle. I had been informed the coffee was sold, but if Mr. O'Brien had had the coffee for sale I would not go near him for it.

Q. I asked you whether you would go and offer a price for it?

A. I would not offer a price for it.

Q. Why?

A. Because I had no opportunity for sampling it myself, Mr. O'Brien had the samples in his possession. If Mr. O'Brien had offered this coffee to me and had said he wished to sell, it would have been another matter, but Mr. O'Brien not having offered them to me is sufficient proof he didn't want to sell them to me and I would not go near him and ask him to sell them to me. It is simply a matter of

(Testimony of Charles Nelson Fulcher.)

delicacy of feeling on the subject of interfering with another broker's work.

Q. By assisting in making a sale?

A. Well, another broker would not like to have a broker assist in making a sale. I know I would not. I am sure that Mr. O'Brien would not, and I am sure any other broker would not.

[Testimony of Charles Nelson Fulcher, for the Respondent.]

CHARLES NELSON FULCHER, called for the respondent, sworn.

Mr. KNIGHT.—Q. What is your full name?

A. Charles Nelson Fulcher.

Q. You were employed in the Little Mail Dock and on the Steuart-street dock in connection with the unloading of the "Santa Rita" in the year 1907, were you not? A. Yes, sir.

Q. In what capacity? A. As clerk.

Q. What were your duties in connection with the unloading of the "Santa Rita"?

A. I kept the ship's books.

Q. You kept the ship's books?

A. Yes, sir.

Q. Which indicated the quantity of stuff which was delivered by the ship? A. Yes, sir.

Q. To the consignees?

A. Yes, to the consignees.

Q. Will you state where the different consignments of coffee that is, the Leege & Haskins coffee, the Brandenstein coffee, and the Schilling coffee were discharged?

(Testimony of Charles Nelson Fulcher.)

A. The Schilling coffee and the Leege & Haskins coffee was discharged at the Little Mail Dock.

Q. And the Brandenstein coffee?

A. The Brandenstein coffee at the Steuart-street wharf.

Q. Was all the Brandenstein coffee delivered at Steuart street?

A. I think nearly all of it—no, some of it came out at the Little Mail Dock, but a very small portion of it.

Q. You saw the coverings of the coffee as the coffee was discharged? A. Yes, sir.

Q. Did you note whether or not any of these coverings appeared stained?

A. Yes, they were.

Q. Were you present when the usual test was applied—when a test was applied to determine whether or not those stains were made by salt or fresh water? A. Yes, sir.

Q. Can you state what the test as usually applied is?

A. Yes, it is acid, which showed fresh water.

Q. Which showed fresh water? A. Yes.

Q. That is it showed it was not fresh water?

A. It was sweat.

Q. It gave it the appearance of having been sweat? A. Yes, sir.

Q. Did you see any indications on the outside coverings of this coffee of stain by oil, damage by oil?

(Testimony of Charles Nelson Fulcher.)

A. Let me see. There was one bag that that I think was pretty badly stained by oil.

Q. How about the others?

A. Simply by sweat.

Q. Now, did you take any samples of that coffee, Mr. Fulcher? A. Yes, sir.

Q. Will you state what samples you took and for whom?

A. I took one or two pounds home myself, just to sample and try it to see what was wrong with it.

Q. From what did you take that sample of the coffee?

A. Indiscriminately; I did not take it from any particular bag.

Q. Did you take it from any particular kind of coffee? A. No, sir.

Q. From whose consignment of coffee did you take that sample?

A. I really could not say; I don't remember.

Q. Where did you take it?

A. On the Little Mail Dock.

Q. Do you know whether it was Mexican coffee or Santos coffee or Bogota coffee?

A. No, I could not say.

Q. You can't tell that?

A. No, I could not tell. I took some home with me and I sampled it pretty thoroughly just to see what the trouble was.

Q. In what condition were the bags in which that coffee came as regards their serviceability?

A. Oh, the bags were in good condition.

(Testimony of Charles Nelson Fulcher.)

Q. Was there any leakage from the bags?

A. Yes, there was some leakage, due to tearing and handling.

Q. Were the bags new bags, or old bags; were they worn or apparently not worn?

A. They had been handled several times.

Q. Do you know Mr. Kopitz? A. Yes, sir.

Q. Who is he?

A. Mr. Kopitz; I know Mr. George Kopitz.

Q. Was there a Mr. Kopitz taking samples down there or around on that wharf when the samples were being taken? A. No, sir.

Q. Was there a Mr. Kopitz who was employed at that time on the wharf?

A. He was employed on the wharf.

Q. By whom?

A. He was employed by, I don't know who he was employed by, he had these logs down there, these cedar or oak logs, an entirely different cargo from this.

Q. Not employed by the owner or charterer of the "Santa Rita"?

A. No, he had no connection with it whatever.

Q. Do you know whether he took any samples himself or supervised the taking of any samples?

A. If he did, I have no idea who he would do it for.

Q. If he did, it was not part of his business, so far as you know?

A. No, I had principal charge of it; he did not.

(Testimony of Charles Nelson Fulcher.)

I know Mr. Kopitz and I know he had no right to interfere with my cargo.

Q. Was there any of this coffee mouldy, that you say on the Little Mail Dock—any mouldy, apparently subject to moisture?

A. Moisture, yes.

Mr. DENMAN.—Q. There was no mould on them?

A. No mould, just moisture on the back.

Mr. KNIGHT.—Q. Moisture on the back?

A. Moisture on the back, yes.

Cross-examination.

Mr. DENMAN.—Q. Mr. Fulcher, you say that there was only one bag oil damaged. Was that badly damaged, that one?

A. It was pretty badly damaged, oh, yes; that bag was all gone.

Q. Some oil on some other bags, was there not?

A. No, sir.

Q. Did you examine every one of those bags yourself? A. I did.

Q. How could there have been oil saturated and running on one bag of the cargo and none of the other?

A. I don't know how that came out, but that bag came out of there saturated with oil. It was down with some other freight.

Q. It showed oil in that compartment?

A. There was oil in the compartment, yes.

Q. How much oil was there on the bottom? As I understand there was pipe in the bottom?

(Testimony of Charles Nelson Fulcher.)

A. Pipe in the bottom of the ship, and that bag of coffee got down in the bottom of the ship.

Q. Then there was oil floating around in all—

A. All over the bottom.

Q. And in among those pipes? A. Yes, sir.

Q. What compartments is that true of?

A. I think it was No. 2 and No. 3.

Q. That was also true of 4 next to the oil tank, was it not? A. Yes, sir.

Q. Two, three and four had this oil in the bottom? A. 2, 3, and 4.

Q. What kind of oil was that, do you know?

A. Petroleum. I remember distinctly that one bag that came out of there, that was soaked with oil. I remember, but that had gotten down among the other cargo.

Q. You live in San Francisco, do you?

A. Yes, sir.

Q. What is your address?

A. 145 5th Avenue, or 214 Kohl Building.

Q. Now, was any of this coffee in 4 compartment, do you know? A. I don't think so.

Q. All 2 and 3?

A. I think all the coffee was in 2 and 3.

Q. Was any coffee aft, in the after part of the ship? A. No, I don't think so.

Q. There might have been, might there not?

A. No, I don't think so.

Q. Was there any coffee finally swept out of one of the holds? A. What is that?

Q. Was not some of the coffee finally swept out

of one of the holds; swept up and gathered up and discharged?

A. No, not to my recollection.

Redirect Examination.

Mr. KNIGHT.—Q. How did that coffee taste that you roasted? You roasted it, I think you said, and drank it? A. It didn't taste so bad.

Q. You detected some odor of a substance foreign to the coffee, I presume?

A. Yes, it was not extra good, I am very fond of good coffee.

Q. You are very fond of good coffee?

A. Yes.

Q. Was it palatable? A. Well, drinkable.

Q. About how much did you have in all of that sample?

A. I suppose about a pound and a half or two pounds. There was some question about it and I wanted to find out myself, and I took some home and I tried it myself out of curiosity.

Q. I understand that was taken from the Little Mail Dock.

Mr. OLIVER.—Mr. Cambron spoke of a sample that I gave him. Will you say where that came from, the bag that I gave him.

Mr. DENMAN.—Q. Did you see him give any bag in the first place? A. No, sir.

Q. Did you give Mr. Oliver any samples?

A. Yes, I gave him some samples, because, of course, we were naturally worried about the coffee, etc., and we wanted to find out as to that.

(Testimony of Charles Nelson Fulcher.)

Mr. KNIGHT.—Q. Who took the samples that you gave Mr. Oliver? A. I did.

Q. Where did you take these samples from?

A. I took them indiscriminately from the bags upon the wharf.

Q. On the Little Mail Dock?

A. On the Little Mail Dock.

Q. Do you recall about how much there was in that sample that you gave Mr. Oliver?

A. I don't know, I suppose probably three or four pounds.

Q. When was it you gave those samples to Mr. Oliver? A. I don't remember when it was.

Q. Can you say how long after the coffee had been discharged on the Little Mail Dock, if it was after the discharge of the coffee? Can you place the time by reference to the date of the discharge?

A. I say four or five days.

Q. Four or five days when?

A. After the discharge of the coffee; it might have been two or three days.

Q. Do you know whether or not the steamer had then gone over to Long Wharf or was she lying alongside the dock?

A. She was laying alongside yet. I gave Mr. Oliver that sample I think just about the same time that I took my own home.

Q. About four or five days after it was discharged? A. Yes.

(Testimony of Charles Nelson Fulcher.)

Recross-examination.

Mr. DENMAN.—Q. What did you put these samples in? A. In paper bags.

Q. You put about three or four pounds in Mr. Oliver's bag?

A. I think about three or four pounds, and I took about a pound and a half or two pounds home.

Q. Was it not about a pound and a half or two pounds that you put in Mr. Oliver's bag, about the same size as you took home?

A. No, more than that.

Q. A little more?

A. A little more than that; a larger bag.

Q. A larger bag than you had yourself?

A. Yes, sir.

Q. It was a paper bag?

A. Yes, a paper bag.

Q. Now, how did you get those samples for trial that you put into your bags?

A. I just opened the top of the sack.

Q. The top of the sack?

A. Yes, the top of the sack.

Q. How many sacks do you suppose you opened?

A. Four or five.

Q. Four or five sacks? A. Yes.

Q. You made up these samples out of the four or five sacks? A. Yes, sir.

Q. That is the only sample you gave Mr. Oliver, was it not? A. Yes, sir.

[Testimony of Walter D. Canney, for the Respondent.]

WALTER D. CANNEY, called for the respondent, sworn.

Mr. KNIGHT.—Q. Mr. Canney, in what business were you engaged in the month of February and in fact during the time the "Santa Rita" was discharging her cargo of coffee in February, 1907?

A. Clerking on the ship.

Q. What were your duties in that respect, what did you do?

A. Well, I was checking and sorting out cargo, looking after the sorting until the time came for delivery.

Q. Did you check up at all or take any note of the cargo that was being delivered by the ship?

A. Yes, sir.

Q. And were familiar with the discharge of the ship, were you? A. Yes, sir.

Q. She discharged coffee on this side of the Little Mail Dock and Steuart Street, didn't she?

A. Yes, sir.

Q. Can you state what consignments of coffee were discharged on the Little Mail Dock and what at the Steuart Street wharf?

A. No, I cannot, because I was there only a short time; I think they were just starting to make the deliveries when I went over to Long Wharf.

Q. Started to make the deliveries of coffee at the Little Mail Dock? A. Yes, sir.

(Testimony of Walter D. Canney.)

Q. Were you there at the Steuart Street Wharf when the ship was discharging there?

A. Yes, sir.

Q. Did you note any coffee discharged at the Steuart Street Wharf? A. Yes, sir.

Q. Now, while the *steamer discharging* did you take any samples of coffee at the Little Mail Dock?

A. Yes, sir.

Q. Of coffee that had been discharged from the ship? A. Yes, sir.

Q. About how much did you take?

A. I couldn't say.

Q. Approximately?

A. Between the two docks I should judge it would be about two pounds; maybe two pounds and a half.

Q. How much of that approximately was taken from the coffee at the Little Mail Dock?

A. Maybe half.

Q. And were those samples taken indiscriminately from the sacks or any particular sacks picked out?

A. No, it was different places; some had come from the sacks, that is where the sacks had been torn and leaked out into the gutter.

Q. Did the sacks give any evidence of discoloration? A. Yes, sir.

Q. Do you know how they were discolored, from the appearance of the sacks?

A. I should judge it would be from the sweat.

(Testimony of Walter D. Canney.)

Q. Did you see the test being made to determine whether or not the sacks were stained by salt water?

A. Yes, sir.

Q. You were there at that time?

A. Yes, sir.

Q. There is a recognized test for determining that?

A. A very good test; that is what they use it for.

Q. Did you see any sacks discolored by oil?

A. No, sir, I did not.

Q. Now, did you yourself examine that coffee at all, roast it or examine it yourself?

A. Yes, sir.

Q. What did you do with the samples that you took?

A. I took them home and roasted them it might have been a couple of months afterwards. I personally could drink it; of course, there was a slight taste of it.

Q. A slight taste to the coffee, you say?

A. Yes, the fumes of the oil, I suppose it was.

Q. Was it noticeable to the sense of smell?

A. Yes, sir.

Q. How appreciable was it, how noticeable was it? Was it very strong or not at the time you roasted it?

A. Well, it was strong enough that anybody could tell it.

Q. How did it taste?

A. Well, it had an off taste to it. Not enough to ruin it altogether.

(Testimony of Walter D. Canney.)

Q. Was it coffee that you might say was drinkable? A. Yes, sir.

Q. As coffee? A. Yes, sir.

Q. Do you say the same of the samples you took on the Steuart street wharf as at the Little Mail Dock? A. They were mixed together.

Q. Did you notice whether any of the coffee that was located on the Steuart Street Wharf was mouldy? A. Do you mean the coffee itself?

Q. The coffee itself. A. Yes.

Q. Are you able to state approximately how much of this coffee was affected in that way?

A. No, I couldn't say.

Q. Was any of the coffee that was discharged on the Little Mail Dock mouldy?

A. That I couldn't say, because I was not there and didn't notice.

Q. Did you notice any deliveries made on that wharf? A. Not at the Little Mail Dock.

Q. Are you able to state from your observation of the Leege & Haskins shipment or the Brandenstein shipment in what relative condition those coffees were?

A. Well, I could not tell you.

Q. You would not be able to state?

A. No, sir.

Q. You noticed the leakage from the bags, did you? A. Yes, sir.

Q. What did that appear to be due to?

A. It comes from the handling.

(Testimony of Walter D. Canney.)

Q. How about the sacks themselves; in what condition was the sacking?

A. Well, it was not exactly what I would call up to the standard; they were not up to the regular coffee sacking, what I call a regular coffee sack, made extra strong.

Q. Those sacks were not up to that standard?

A. No, sir, they were not up to that standard.

Q. Let me ask you, for how long have you been handling coffee shipments in this way, that is checking up and assisting in discharging the coffee at this port? A. At this port?

Q. Yes, or elsewhere on this coast?

A. Well, I was with the Mail Company for about seven years.

Q. Engaged in similar duties?

A. Yes, sir.

Q. Handling coffee in this way?

A. Handling coffee in the same way, yes.

Cross-examination.

Mr. DENMAN.—Q. You were the discharging clerk, were you, on the "Santa Rita"?

A. Yes, sir.

Q. Are you regularly employed by the Union Oil Company or the United Steamship Company?

A. No, sir. Do you mean being regularly in their employ?

Q. Yes. A. No, sir.

Q. Are you employed from time to time to discharge ships by Mr. Jerome?

A. That is the first time.

(Testimony of Walter D. Canney.)

Q. Now, you were on the "Santa Rita" on Long Wharf, were you? A. Yes, sir.

Q. Do you remember testifying in another case over there? A. Yes.

Q. As I understand it, you saw the coffee discharged at Steuart Street dock, is that it?

A. At both docks.

Q. At both docks? A. Yes, sir.

Q. Did you see the entire discharge at Little Mail Dock?

A. Yes, whatever left the ship at the Little Mail Dock I saw. What I meant was I was not there at any of the deliveries.

Mr. KNIGHT.—Q. You mean delivery to the consignees? A. Yes, sir.

Mr. DENMAN.—Q. You say you took up this coffee, which you put into these bags, from the wharf? A. Yes.

Q. Where it had fallen from the torn sacks?

A. Yes, sir.

Q. Was there much of that?

A. Do you mean much of the coffee that I took?

Q. Much of the coffee that was in this torn condition, in the torn sacks?

A. You cannot tell because there is always more or less sacks torn in a cargo of coffee.

Q. But you made up a bag of this yourself and a bag for Mr. Oliver?

A. No, sir, just for myself.

Q. Just for yourself? A. Yes, sir.

(Testimony of Walter D. Canney.)

Q. That was the coffee that you subsequently took home? A. Yes.

Q. Which had this queer taste in it, but you could drink it without being sick?

A. Yes, sir.

Q. You did not make any other sample of the coffee? A. No, sir.

Q. You were present when these tests were made to see whether it was salt or fresh-water stain?

A. Yes, sir.

Q. By the way, did you see what the water bottoms of this vessel were filled with?

A. What is that?

Q. Did you see what the water bottoms in the "Santa Rita" were filled with? A. No, sir.

Q. As a matter of fact, you know they were filled with fresh water, don't you?

A. That I could not say; I did not see them at all.

Q. You remember that testimony, that there was?

A. Yes, I remember it.

Mr. KNIGHT.—We object to anything of the character or hearsay that the witness might know from the testimony given by others.

Mr. DENMAN.—Q. Did you see this oil-soaked sack that came out? A. No, sir, I did not.

Q. You were not there all the time?

A. I did not go back to the little Mail Dock after I went to Long Wharf.

Q. There was a good deal of coffee discharged at the Mail Dock after that?

(Testimony of Walter D. Canney.)

A. No more discharged at the Mail Dock after Long Wharf; the rest of it was discharged at Steuart Street.

Q. Where was the coffee that was finally scraped together and shoveled out of the vessel—where was that taken off?

A. I don't know, I did not see any at all.

Q. You would not be able to say whether there was or was not such coffee?

A. No, sir, I would not know, because I did not see any.

[Testimony of F. B. Oliver, for the Respondent.]

F. B. OLIVER, called for the respondent, sworn.

Mr. KNIGHT.—Q. Will you state whether or not you are connected with the Union Oil Company and have been during the year 1907?

A. I was.

Q. In what capacity?

A. I was supposed to be superintendent of their steamers.

Q. As such will you state whether or not you had general supervision respecting the discharge of the cargo of the "Santa Rita"? A. I did.

Q. And the coffee that is involved in this case was discharged when, if you know, Mr. Oliver?

A. On the 30th and 31st of January, 1907.

Q. Do you know when that coffee was taken away by the consignee? A. The following week.

Q. Do you know the day of the week?

A. No, I could not say, because it was there for a long time, on the Little Mail Dock, and the Chief

(Testimony of F. B. Oliver.)

Warfinger had notified me several times that unless it was taken away that he would put it into the unclaimed warehouse, and I called the consignees up several times, asking them to go and pay the freight and take it away. Now then, they did not come until the 5th of February.

Q. You spoke of a long time. What do you mean by the *express* "a long time"? A. A week.

Q. When was the freight paid, do you remember?

A. The freight was paid on the 5th.

Q. On the 5th of February?

A. Fifth of February, both of them, Leege & Haskins and Schilling.

Q. Mr. Oliver, did you receive a sample of coffee from Mr. Fulcher who has just testified?

A. I did and I did not. The coffee was let for me at the office of the Michigan Steamship Company on Steuart street. I did not know anything about it until the following week. Mr. Hunt, who was the freight clerk in charge of these cargoes, who is now dead, took that, thinking I might want it. When I found out this coffee was sold without any notification, I went to Mr. Hunt and I said, "Get me a sample of that coffee just as quick as you can, provided it has not left town." He said have you got that sample, I did get for you? I told him I did not know anything about it. Then he told me of the sample he had left at 23 Steuart Street. I went down and found that bag of coffee, which I took to Mr. Cambron, and asked his opinion, and told him that coffee had been sold without any effort being

(Testimony of F. B. Oliver.)

made to obtain our opinion on the thing or to appraise its damage.

Q. What time was it that you had this first talk with Mr. Cambron?

A. That was along about the 16th of February.

Q. And you gave the sample to Mr. Cambron?

A. Yes, sir.

Q. That is all you know about that?

A. That is all I know about that.

Q. When was the first time that any complaint was made to the claimant regarding this Legee & Haskins office?

A. Absolutely nothing from Messrs. Leege & Haskins at any time.

Q. That is prior to the filing of the libel?

A. No, sir.

Q. You were first advised by the filing of the libel?

A. I know of it by the receipt of these letters, and on these letters I acted.

Q. Then the first time that you received notice of any complaint was from Schilling & Company?

A. Yes, sir.

Q. Dated the 13th of February, 1907?

A. I received it the next day; it was a registered letter.

Mr. KNIGHT.—We offer that in evidence merely for the purpose of fixing the time regarding that particular complaint.

(The paper is marked "Claimant's Exhibit 1.")

(Testimony of F. B. Oliver.)

Q. Did you receive any letter from Leege & Haskins or anyone representing Leege & Haskins respecting this coffee? A. No, sir.

Q. The coffee in suit here I mean?

A. No, sir.

Q. When did you learn for the first time that this Leege & Haskins coffee had been sold?

A. At that time when I went over to Mr. Alexander, who represented the Schilling coffee.

Q. I want to know the dates. You learned on or about the 13th of February? A. The 14th.

Q. The 14th, that this coffee had been sold?

A. Yes, sir.

Q. Then you were not asked at all to assist in securing any purchaser for this coffee?

A. No, sir, I knew absolutely nothing of it.

Q. Did all this Leege & Haskins and Schilling coffee come out of the ship at the Little Mail Dock?

A. It did, every cent of it.

Q. Of what did the Leege & Haskins consignment consist, what kind of coffee?

A. The man who paid the freight to me told me it was all Santos coffee.

Q. How about the Schilling Company?

A. The Schilling Company, Mr. Volkman's brother, told me that was Mexican.

Q. How much of the Brandenstein coffee came out on the Little Mail Dock?

A. About one-half.

Q. The balance from Steuart Street?

A. Yes, sir.

(Testimony of F. B. Oliver.)

Q. And that came out of hold No. 3?

A. Yes, sir.

Q. The Brandenstein coffee came from No. 3?

A. Part of it.

Q. At the Steuart Street Wharf?

A. At the Steuart Street Wharf.

Q. Where did the coffee come from that was discharged at the Little Mail Dock?

A. Two and a part of 3.

Q. Did you also at the time of learning of the sale of the Leege & Haskins coffee learn of the sale of the Schilling coffee?

A. I did. I learned of the Schilling coffee first, and then was told at the same time that the Leege & Haskins coffee had been sold at the same time.

Q. Were you given any opportunity to assist in securing a buyer for the Schilling coffee, either?

A. No, sir.

Q. Now, Mr. Oliver you have been in the coffee business yourself? A. Yes, sir.

Q. And for how many years?

A. Seven or eight; a direct importer from Mexico and Central America.

Q. Are you familiar with the different kinds and grades of coffee? A. Yes, sir.

Q. Were you familiar with the condition of the coffee market during the year 1907?

A. Not specially, except upon inquiry. When this coffee came in I made some inquiry as to what the market was.

(Testimony of F. B. Oliver.)

Q. Did you take any part in the sale of this coffee to Mr. Cambron?

A. I did. That was the Brandenstein coffee.

Q. What coffee was sold to him?

A. All of the Brandenstein, the Bogota and the Santos.

Q. What would you say respecting the tendency of coffee, if exposed, coffee that has been subject to damage such as this Leege & Haskins coffee was, to lose the foreign odors or fumes with which it might become more or less impregnated?

A. As a rule, it never would.

Q. Would it make any difference, as far as the odor of coffee is discernible, to keep that coffee in a bottle that was kept tightly corked, or on the other hand, if it was kept in any vessel or package that might be more or less subject to the air?

A. Yes, sir.

Q. That is, in the former instance, it would retain its odor far more?

A. Yes, sir, it would retain its odor naturally.

Q. Did you notice whether or not any of the coffee on the Little Mail Dock was mouldy?

A. There was some of it from the sweating, moisture; not to any great extent. There were some sacks that showed on the sacks on the outside a slight mould from the moisture that had gathered there.

Q. Due to sweating?

A. Due to sweating. That was the reason the ship was put in there. The captain was afraid the cargo was heating, otherwise he would have gone to

(Testimony of F. B. Oliver.)

Long Wharf, Oakland, and discharged his carbide first.

Q. So that he put into the Little Mail Dock because he feared his cargo was heating?

A. Yes, sir.

Q. And discharge this coffee?

A. Yes, sir, and a great deal of the canned goods that were in 2 and 3.

Q. What was the condition of the coffee, as far as any mould on it at the Steuart Street Wharf?

A. That was very much worse. The Brandenstein coffee was put into the ship first, and that down right against some case goods in No. 3, and that had the weight of the other cargo on it.

Q. Therefore it was not in as good condition?

A. Therefore it was not in as good condition.

Q. Do you know how the market ranged generally and what its condition was from the month of February for the next six or eight months?

A. No, sir, I did not keep track of it after that was sold, and I did not know what disposition was going to be made of the Brandenstein coffee.

Q. What did you notice respecting the outward indications, the stain of the coffee that was discharged at the Little Mail Dock?

A. A jute bag taking moisture will always show stain.

Q. That coffee gave indication of stain?

A. A great many of the sacks were stained from moisture.

Q. Do you know from what moisture?

(Testimony of F. B. Oliver.)

A. No, sir, other than the moisture contained in the cargo itself. All cargo in ships, as a rule, when confined any length of time, sweats.

Q. Was there any indication of stain from oil?

A. No, sir, none whatever.

Q. Or from salt water?

A. No, sir, I had a test made of the Brandenstein coffee for salt water, by the nitrate of silver test.

Mr. DENMAN.—Q. When was the one that was referred to a little while ago here taken?

A. That was taken down on the Little Mail Dock. They did not know possibly but that the ship had leaked.

Mr. KNIGHT.—Q. Do you know when this coffee was received and paid for by the consignees?

A. I gave the order on the 5th of February.

Q. Do you know whether it was received and paid for at that time?

A. They paid me and I gave them the delivery order. It was theirs at that time.

Q. Did anyone represent the claimant or the ship, as far as you know, or the charterer of the ship, when this Leege & Haskins coffee was sampled and sold? Was the ship represented at all in taking samples by Leege & Haskins?

A. No, sir; even those men that were here did not know the sampling that had been done.

Q. Do you know a man named Kopitz?

A. No, sir.

(Testimony of F. B. Oliver.)

Q. Do you know whether any man named Kopitz represented the ship at that time?

A. No, sir, there was no one of that name at all.

Q. Did you notice any leakage from the bags?

A. A great many of them were broken.

Q. How was that caused?

A. The bags were too light for the shipment of the coffee. It was an ordinary burlap bag.

Q. What kind of bag is coffee usually shipped in?

A. In a heavy twill bag, 2½ poung bag.

Q. What was the freight rate on that shipment?

A. Forty cents a hundred.

Q. You have the bill of lading there?

A. Yes, sir.

Q. And that coffee was shipped in October of 1906?

A. It was received on the 16th of October at the Bush terminal in New York—no, received on the 18th of October, 1907, the Brandenstein, the Leege & Haskins and the Schilling coffee.

Q. Do you know Mr. C. G. Cambron?

A. I do.

Q. Do you know to what extent he has been engaged in the coffee business?

A. I have known him for the last 12 or 14 years as a coffee broker personally.

Q. How does he stand in the trade here?

A. Very well, indeed; very high.

Q. Do you know to what extent his business compares with that of other coffee brokers?

(Testimony of F. B. Oliver.)

A. It is not as large as C. E. Bickford. He fell heir to the old Hockoffler trade. Mr. Hockoffler was the pioneer broker here.

Q. That was a well-established business?

A. That was a well-established business.

Cross-examination.

Mr. DENMAN.—Q. Have you a statement of the deliveries that were made by the company?

A. I have, in the delivery book; there it is (handing).

Q. I see here at page 41 a series of items headed "Received in good order from the Union Steamship Company on the day below stated the respective packages set against our respective names subject only to exceptions noted." What does this page 41 contain?

A. All of the Leege & Haskins coffee.

Q. I notice the number of bags total up 1081 bags? A. Yes, sir.

Q. There are only 1067 bags that were consigned to Leege & Haskins.

A. That was because of the leakage of the bags and the breaking of the bags, and they took other bags and filled them up.

Q. So that the total weight delivered was practically the same? A. Yes, sir.

Q. That weight amounted to 152,764 pounds?

A. The Leege & Haskins weight given here is 138,710.

Mr. KNIGHT.—Q. How much was delivered?

(Testimony of F. B. Oliver.)

A. 1067 bags of coffee; the weight given is 138,710.

Q. How much do the books show were delivered?

A. It does not show in weight, only in the number of sacks.

Mr. DENMAN.—Q. I understand that you delivered 1081 sacks to make up the difference in weight. What weight?

A. No, sir. That coffee was identified as Leege & Haskins', coming out of their bags as marked. As they did not have that sized bag, they would take any bag and would fill it up with the coffee that belonged to Leege & Haskins.

Q. Without the additional bags you had 1055 bags, and then the additional between 1055 and 1067 is contained in these 33 extra bags; is that correct?

A. Yes, sir.

Q. Now do you know what the actual weight of that coffee was? A. No, sir.

Q. What negotiations did you have with Mr. Bickford regarding it? A. None whatever.

Q. I understand he made a claim on you for what? A. All of the sweepings.

Q. How much did he claim at that time?

A. All of the sweepings.

Q. How much was the claim?

A. He was billed by the Canton Insurance Company for that coffee with 151,236 pounds.

Q. What did he claim from you further?

A. And he claimed all of the sweepings.

Q. How many pounds?

(Testimony of F. B. Oliver.)

A. He has 1528 pounds short here. He did not claim this from me. He demanded of me all of the sweepings which I refused to give him, telling him it would be apportioned when the cargo was cleared up.

Q. What did you ultimately deliver to him?

A. 32 bags; 22 at one time, and 9 at another.

Q. Is that the 32 that you are referring to here?

A. Probably it was.

Q. Do you know what the actual weight of the cargo was?

A. Only so far as the bill of lading gives me. He paid freight $554.84. That was 40 cents on 138,710 pounds.

Q. But you do not know the actual weight of the coffee?

A. No, sir, I have no way of telling that. The coffee was taken away.

Q. Do you recollect our coming to an agreement to these figures?

A. We agreed on that, I think.

Q. That the weight of the coffee was 152,764 pounds? A. According to the bill

Mr. KNIGHT.—Q. As delivered?

A. No, sir, as originally invoiced, I think I have got that somewhere myself.

Mr. DENMAN.—Q. Is there any question, Mr. Oliver, about the original invoice weights?

A. Of course, I do not think there could be anything about the original invoice, that is Arbuckle's original bill, but as you and I discussed it, you were

(Testimony of F. B. Oliver.)

willing to pay the difference in freight. We agreed on that at that time,—you agreed to pay the difference in freight on that thing in that adjustment that we tried to arrive at, and I accepted it, that it had been understated in the bill of lading.

Mr. DENMAN.—The understanding between Mr. Oliver and myself is that the invoice weights, 152,764 pounds, control and that we are to pay the difference in the freight.

The WITNESS.—That was the agreement that I had with you last May, if that holds.

Redirect Examination.

Mr. KNIGHT.—Q. The libel set forth a delivery by libelant to the steamer of 1067 bags of Santos coffee, weighing 152,764 pounds to be delivered, etc., and the answer admits a delivery of 1067 bags of green coffee weighing 138,710 pounds and no more. Now I understand you to say, Mr. Oliver, that the amount received by the steamer was not as per the bill of lading? A. No, sir, it was not.

Q. That that bill of lading is incorrect and has understated the number of pounds of coffee actually received by the ship consigned to Leege & Haskins?

A. It must be, if that is the bill they paid.

Q. Have you been presented with the bill?

A. No, sir, only as Mr. Denman showed it to me last May.

Q. Then Mr. Denman has shown you a bill which Leege & Haskins paid Arbuckle?

A. Yes, sir.

Q. Calling for a total weight of 152,764 pounds?

(Testimony of F. B. Oliver.)

A. Yes, sir.

Q. That is the weighers' statement?

A. I don't know what that is.

Mr. DENMAN.—I gave you the weighers' statement.

Mr. KNIGHT.—Q. I want to get at on what basis you made the statement that the weight shown by the invoice that Mr. Denman has produced and shown you is correct rather than the amount set forth in the bill of lading?

A. The invoice is right.

Q. And you took the invoice?

A. I will admit that the invoice is right.

Q. Rather than the ship's bill of lading?

A. Yes, sir, I would.

Q. If that is the fact, all right?

A. The only thing I have to go by is my bill of lading; I spoke to you and Mr. Page about it.

Q. I do not remember the conversation. Whatever the fact is and you are convinced that is the amount, well and good. I only want to get at the basis of your statement.

A. I do not think Leege & Haskins would pay for seven tons of coffee if it was not shipped.

Q. You make the admission on a weighers' list shown you?

A. As I remember it, he showed me a little pencil memorandum. (Addressing Mr. Denman.) Did you show me a weighers' list?

Mr. DENMAN.—Yes, and this one too. There was another list.

(Testimony of F. B. Oliver.)

Mr. KNIGHT.—Q. I only want to see on what you discredit your own bill of lading.

A. I think it was that bill there.

Q. Where did they get their estimate from?

A. That I cannot tell you. I did that last May for the purpose of arriving at a settlement.

Q. You wish to have it admitted as a fact here?

A. I will leave that to you.

Q. I do not want to quibble on what is a fact. I want to get at the truth.

A. I don't know whether that is a fact or this is a fact.

Q. All I know is from the bill of lading which you turned over to me. If you believe the bill of lading therefore is wrong and this is right, it is up to you.

A. This is practically 130 pounds to the bag. This 138,000 is 130 pounds to the bag.

Q. Whereas the large weight, 152,764 averages 140 pounds to the bag?

A. Yes, sir, that is a very heavy bag. That is a great deal heavier than the Brandenstein coffee was. That only went a little over 133 pounds. I attributed that to the fact that half of that coffee was Bogota.

Q. Do you know how the Santos coffee of the Brandenstein shipment averaged up?

A. No, sir.

Q. Do you know how the Schilling coffee averaged up?

(Testimony of F. B. Oliver.)

A. That was 65,000 pounds. There were 500 bags. That would be 130 pounds to the bag.

Q. Would that at 130 pounds, multiplied by 1067 equal 138,710?

A. Yes, sir, practically. This goes at 131 pounds.

Q. What does?

A. The Brandenstein coffee. I think that was the reason I did it. I think I went over that question before, and I spoke to either you or Mr. Page about it at the time, last May, what we would have to do in that.

Q. I do not recall that.

A. Then I am certain that I figured these up at the time to see how they did go, and I think there was a difference in that Schilling coffee too.

Mr. DENMAN.—Very likely there was.

The WITNESS.—I think that Schilling coffee came 10,000 short.

Mr. DENMAN.—Q. That is to say a shortage between the bill of lading weight—

A. And the invoice weight.

Mr. KNIGHT.—Q. The invoice weight was 10,000 pounds more than the bill of lading weight?

A. Yes, sir. The Brandenstein New York invoice called for 100,856 pounds. The bill of lading called for 97,804. That only went a little over 133 pounds to the bag.

Q. Under the invoice weight?

A. Yes, sir.

(Testimony of F. B. Oliver.)

Recross-examination.

Mr. DENMAN.—Q. Evidently it was taken at 130 pounds by the ship?

A. It figures out 131 pounds, a little over. That was the reason that I agreed to that last May.

Q. You remember our discussion as to a shortage of 19 bags, of 141 pounds each, amounting to 2679, which at that time we thought was a total loss?

A. I did have that for a long time. I am under the impression that I have got it yet. I did have it, but I have forgotten what I did with it.

Q. The fact was, Mr. Oliver, was it not, that there was a certain amount of coffee, a certain number of bags amounting to something like 1051 or 1052 pounds that were delivered in bags and subsequently you gathered together a lot of sweepings that had been in other bags shipped in this shipment, and delivered those to Mr. Bickford?

A. To Mr. Lewin.

Q. And you do not recollect at the present moment how many bags those were, but your recollection is around 18 or 19? A. 31.

Q. You could get the weight of that?

A. Yes, sir.

Mr. KNIGHT.—Q. Who was Lewin?

A. The purchaser of this coffee.

Q. The Leege & Haskins coffee?

A. Yes, sir.

Mr. DENMAN.—Q. Lewin told you he was the purchaser of the coffee?

(Testimony of F. B. Oliver.)

A. He came and claimed it with the warehousemen. He came and claimed it with the warehousemen. He came to me and demanded all of the sweepings.

Mr. KNIGHT.—Q. Did he claim he paid for it?

A. Yes, sir.

Q. Did he give you the figure he paid for it?

A. No, sir, not at that time.

Q. Did he afterwards give you the figure he paid for it? A. He gave that to me to-day.

Q. Have you got that with you?

A. Yes, sir, 5½ cents he paid for it, less 2 per cent for cash.

Q. What does he say he sold it for?

A. 6¾ cents.

Mr. DENMAN.—Q. After reconditioning?

A. Yes, sir.

Q. What did he say his profit was for handling and reconditioning it?

A. He said, to the best of my recollection, he made a net profit of from ⅜ to ½ cent a pound.

Mr. KNIGHT.—Q. Did you calculate that thing up?

A. Yes, sir; he made more than that. His expense of reconditioning that was a little over a half a cent.

Mr. DENMAN.—Q. You do not know that of your own knowledge? A. Yes, sir.

Q. You did not see him spend it?

A. I know the bills he paid.

Q. You did not see him pay them?

(Testimony of F. B. Oliver.)

A. I saw one bill he did pay.

Q. Did you see him pay that yourself?

A. No, sir, but they said they got it from him.

Q. That is all you know about it?

A. The Hazlett Warehouse said they paid them.

Q. That is all you know about it?

A. I did not see him pay the money.

(An adjournment was here taken until Thursday, December 31st, 1908, at 12 M.)

Thursday, December 31st, 1908.

F. B. OLIVER, recalled, cross-examination resumed.

Mr. DENMAN.—Q. Mr. Oliver, I hold in my hand a piece of brown paper with the words "Lewin" on it and some figures thereafter. Are those the figures given to you by Mr. Lewin?

A. They were and were not. He gave me the bill and I got it from the bill; they came from the insurance company to him.

Q. He got the bill from the insurance company?

A. The Canton Insurance Company rendered him a bill for the purchase of the coffee, and these were the figures that were on the bill.

Mr. KNIGHT.—Q. What do those figures represent?

A. The gross weight of the coffee, the deductions, and some charges on prices at which it was sold, and some charges which I question.

Mr. DENMAN.—We will offer this in evidence and ask to have it marked "Libelant's Exhibit 3."

(The paper is marked "Libelant's Exhibit 3.")

(Testimony of F. B. Oliver.)

Q. It is understood that you will give me the number of pounds delivered to Lewin?

A. Yes. In September or the first of October I did not know to whom to make the delivery, and I went to him and I think I went to O'Brien, I won't be certain of that; but Lewin told me at that time that they belonged to him, and he asked me to put it in the warehouse for his account, which I did; he designated the warehouse to me in which I should put them, and I gave them some of it that belonged to the Brandenstein account, and I delivered this to Cambron as a part of their coffee, being their proportion.

Q. Have you that delivery-book here?

A. The one that I had last night?

Q. Yes. A. Yes.

Q. Mr. Oliver, I notice that this delivery-book shows that on February 7, 440 sacks were delivered, and on February 8, 560, and that the balance of the deliveries were on the 9th, 15th and 27th of February. That is correct, is it?

A. Oh, yes, that is right.

Mr. KNIGHT.—Q. That is the Brandenstein delivery? A. No, this is the Leege & Haskins.

Q. Delivered by the ship? A. Yes.

Mr. DENMAN.—Q. By the ship from the dock to the expressmen as they came along.

A. One thing there is here; you have got these sweepings down. Are those signed for? I was thinking of those sweepings last night.

Q. It says "Whaley."

(Testimony of F. B. Oliver.)

A. That is right. He took them; his draymen, and there is the number of them.

Q. He took the one stained with oil, the one sack?

A. He took that one sack.

Q. They have got sweepings on the 9th.

A. That came off the Little Mail Dock.

Q. And went to H. S. Searl; he was the man that signed for all the others. A. That is right.

Q. Then on the 27, 9 and 16?

A. Nobody signs against those, do they?

Q. Nobody signs them but against those is the name of Kuhn. A. He took them then.

Q. Who is Kuhn?

A. He is a drayman; there is the number of the dray there.

Q. Whose drayman is he?

A. The warehouse.

Q. He took those to the warehouse?

A. Yes.

Q. These sweepings then, those last two items—these last four items of sweepings—

A. Only those that are crossed. Those two that are crossed there are sweepings. There is one stained with oil; is that one stained with oil marked "Whaley"?

Q. Yes. A. Whaley took that.

Q. There is an item the fourth from the bottom, seven sacks of coffee sweepings received by H. S. Searl. A. Searl took that.

Q. Did Searl take that off the ship or did Leege & Haskins? A. Leege & Haskins.

(Testimony of F. B. Oliver.)

Q. Then the next item the one stained with oil, Whaley.

A. Yes, that went into the California Warehouse.

Q. Then 9, Kuhn. A. That is right.

Q. That went into the warehouse?

A. The Humboldt Warehouse.

Q. And 16 sweepings, Kuhn?

A. That went into the Humboldt Warehouse.

Q. That was the stuff that was subsequently delivered?

A. No, additional; that that I gave him was additional.

Q. Then in addition to these 9, 16 and 7 parcels here of sacks, the sweepings were delivered later on in September?

A. They were in September, I could not give you the date exactly, but I have a memorandum that I had the waste sent up to him on a truck. At any rate I can go to the warehouse and get that. They were small bags, grain bags, the only thing I could get, 22 or 23.

Q. How much would they amount to?

A. They amounted to between 90 and 100 pounds.

Q. How many of them were there?

A. 31, 22 at one time and 9 at another, that being their proportion, as to the number of sacks. Of course, you must remember all I had to go by was my bill of lading, and at that time I asked Leege & Haskins to give me the weights or bills and other information I wanted and they would not give me any. As to the actual weight I knew nothing outside of that bill.

(Testimony of F. B. Oliver.)

Further Redirect Examination.

Mr. KNIGHT.—Q. Mr. Oliver, with reference to this memorandum headed "Lewen 9½," which has been offered in evidence on behalf of the libelant, and which seems to contain some letters and figures which are not self-explanatory; can you state or interpret, so to speak, that memorandum?

A. Yes; "Lewen 9½"; that was the cost of the coffee.

Q. What do you mean by 9½; cost to whom?

A. That was the cost to Leege & Haskins, the original cost.

Q. In New York? A. In New York.

Q. Now will you explain the rest?

A. 151,236 at 5¼ cents less 2 per cent; that was what he bought and paid for.

The COMMISSIONER.—Q. That is Mr Lewen?

A. Mr. Lewen.

Mr. KNIGHT.—Q. This is Leege & Haskins?

A. This is Leege & Haskins. This is 1,528 pounds short; this added to the above amount make 152,674 pounds, which I am told is the total invoice as rendered by Arbuckle Brothers.

Q. Are those invoices in existence?

A. Mr. Denman had them.

Mr. DENMAN.—They were the basis of our agreement last spring.

The WITNESS.—This is the freight, $558.29. Now let me see whether that is or not.

Mr. KNIGHT.—Q. All I want is an interpretation of the paper.

(Testimony of F. B. Oliver.)

A. The freight is $558.29. He has got expense $70. Then to all of that was plus 10 per cent.

Q. Plus 10 per cent; what does that represent?

A. I don't know.

Q. He did not state what that represented?

A. He said that was always on the bills. I told him "don't say it is always on the bills; I have received a great many of them, and it don't mean anything to me.

Q. But it appears in that statement as an additional charge?

A. Yes. The total charge was $16,495.28.

Q. Now, you said in your cross-examination that you had had some negotiations with Mr. Denman respecting this shipment, and during those negotiations you had accepted as correct a statement of weight as shown by certain invoices in his possession; is that correct? A. Yes; that was last May.

Q. Which invoices showed a somewhat greater weight than the bill of lading?

A. Than the bill of lading. I will say here that I accepted these in consideration of being allowed the additional freight.

Q. That additional freight has not been received?

A. No, sir.

Q. Now, do I understand that that was reached in the course of negotiations looking to a compromise of the claim? A. Yes, sir.

Q. Was that compromise ever affected?

A. No, sir.

Mr. KNIGHT.—I shall move to strike out all the

(Testimony of F. B. Oliver.)

evidence on that subject, inasmuch as it appears that whatever admission was made by Mr. Oliver or whatever basis he may have accepted as the true weight of the shipment was during the course of negotiations for a compromise which was never consummated.

Q. I do not want to have it appear that we are taking any technical position, if by so doing we are in any way preventing the bringing out of the facts respecting the total amount of these shipments in pounds, and I will therefore ask you, Mr. Oliver, irrespective of any negotiations you may have had with Mr. Denman during the attempts made to compromise this claim, whether or not you are satisfied and you feel that you can with fairness admit that the invoice weights as presented by Mr. Denman are correct rather than the weights set forth in the bill of lading? And I will say this further that, if you do not feel that you can do so now, but that you can after you make a little investigation—you can easily determine that—I am willing, with the consent of the other side, to have you give the number, and I suggest that the taking of further evidence be continued until it can be determined whether or not the claimant can stipulate as to the total amount of pounds in this shipment, and we will endeavor to inform ourselves sufficiently so as to be able to stipulate to that, or whether we cannot.

The WITNESS.—I will endeavor to get that.

(An adjournment was here taken until Tuesday, January 5th, 1909, at 2:30 P. M.)

(Testimony of F. B. Oliver.)

Tuesday, January 5th, 1909.

F. B. OLIVER, recalled.

Mr. KNIGHT.—Q. Mr. Oliver, at the close of the testimony the other day the question arose respecting the true weight of that Leege & Haskins coffee, and I believe you were to satisfy yourself as to whether or not you could admit that the weight was other than that contained in the bill of lading?

A. Yes, I am satisfied that the bill is the correct weight.

Q. Now, let us get that into the record.

A. 152,764 pounds.

Q. You are satisfied that that was the weight of the coffee that was delivered to the steamer at New York for shipment to San Francisco?

A. Yes, sir.

Q. To complete your admission in that respect, have you calculated what would be the difference in the freight that I understood you to say was to be paid, or which would be the same thing, deducted from any finding of damage?

A. That could be very easily ascertained, the difference between the bill of lading and this.

Q. Can you make that?

A. Yes. Now, the bill of lading calls for 138,710; the difference between them is 14,054 pounds; now that is at 40 cents a hundred pounds; the difference in freight would then be $56.22.

Q. Fifty-six dollars and twenty-two cents.

A. Yes. And then there are state tolls; that is at 5 cents a ton or any fraction thereof, and that

(Testimony of F. B. Oliver.)

would be 35 cents. Adding those together, it would make $56.57.

Q. That would be all that would be collected by the ship? A. Yes.

Q. You were familiar with the Leege & Haskins coffee, the Schilling coffee and the Brandenstein coffee, were you not, as it was inspected and the consignments were delivered by the ship?

A. Yes, sir.

Q. Will you state what was the relative condition of the Leege & Haskins coffee and the Brandenstein coffee?

A. All of the coffee which came out on the Little Mail Dock, and which included about one-half of the Brandenstein coffee, all of the Schilling and all of the Leege & Haskins, barring the stained bags which arose from sweating, barring the odor of the thing, of course, was in very good condition.

Q. How about the coffee delivered at Steuart Street?

A. The Brandenstein coffee, that was down below a good deal of freight, and it got very warm down there and it sweated, and any quantity of that was mouldy. Bissell called my attention to it at the Humboldt warehouse, acting for the Hazelet Warehouse, and he did not know what he was going to do with it; that was in very poor condition; that was the coffee which was problematical, what it was worth.

Q. That was coffee delivered at Steuart Street?

A. That was the Bogota coffee.

(Testimony of F. B. Oliver.)

Q. That was situated—

A. That was right down on top of the pipe.

Mr. DENMAN.—Q. How do you know it was down on top of the pipe?

A. I saw it when it came out.

Q. What hold was that in?

A. No. 3. No. 2 was emptied completed at the Mail Dock, and part of No. 3. That was the reason for taking the steamer in from the stream, the captain was afraid the cargo was heating, and he wanted to stop it, and the best we could do was the Little Mail Dock. We wanted a long covered dock so that the ship could get in.

Q. Why was that so much worse down in the bottom of 3 than in 2?

A. Why, because there was canned goods there in No. 2 and this coffee was on top of that. Then they commenced in No. 3—

Q. What difference is it whether it is high up or low down?

A. It makes a great deal of difference, having the enormous pressure on it that there was.

Q. What difference does the pressure make?

A. In the heating; it is more confined.

Q. More confined? A. Yes.

Q. Was there just as much oil in 2 as there was in 3? A. No.

Q. More oil in 3 than there was in 2?

A. Yes, that is closer to the oil, and the oil to get in 2 would practically have to run up hill.

Q. How deep was the oil in 3?

(Testimony of F. B. Oliver.)

A. I saw very little myself.

Q. How deep was it?

A. I could not really tell you. I did not go down to measure it. It was all around the pipes in some of the places, in others not; none of the pipes were submerged down in No. 3.

Q. But there was enough that when she was on an even keel it was up on the pipes?

A. I suppose it would be up on the pipes.

Q. If she listed over to one side or another that would make quite a depth of oil?

A. Yes, it would.

Q. What was that—fuel oil?

A. I presume it was.

Q. Of a light brown color?

A. Well, it was pretty dirty. I could not tell you what color it was.

Q. Now, do you remember testifying that you received a paper bag containing a couple of pounds of coffee? A. Yes, sir.

Q. That was the only coffee that you received out of this consignment? A. Yes, sir.

Q. Did you ever have that tested?

A. I gave it to Cambron.

Q. That is all you know about it?

A. That is all I know about it. That was after the coffee was sold.

Mr. KNIGHT.—Q. After what coffee was sold?

A. The Leege & Haskins and Schilling.

Mr. DENMAN.—Q. So you don't know anything about the relative values of the two coffees from test-

ing? That is to say, the Brandenstein coffee and the coffee at the little Mail Dock, from any test was made? A. No, sir.

Q. And all you know is what you saw with your eyes?

A. What I saw myself and the experience I have had in the coffee business.

Q. As a matter of fact, the coffee, the oil-soaked coffee—

A. There was no oil-soaked coffee.

Q. You said that there was a great deal that had to be dumped into the bay?

A. There might have been a shovelful that had leaked through.

Q. I am not now talking about the coffees on the Little Mail dock, but the other dock. I understood there was a considerable quantity had to be thrown into the bay. A. Not that know of.

Q. Then the only difference between those two was in the nature of the saturation of oil fumes?

A. No, I won't say that. The oil fumes went through the whole of it; there was some of it that was stronger than the other, because every particle was subject to the oil fumes, that whole cargo, every particle of it; the sweated coffee down there had commenced to mould, and then again you must remember that these Bogota coffees, Central American coffees and Mexican coffees contain a great deal more moisture than the Santos coffees; they are not dried so well.

(Testimony of F. B. Oliver.)

Q. Now, when was it you say this mould was first called to your attention? By whom was this?

A. Mr. Bissel.

Q. Mr. Bissel?

A. Yes. He was the manager for the Hazlett and certain warehouses.

Q. When did he call your attention to this?

A. Shortly after it came out, down at the Little Mail Dock. I had seen it myself, but he spoke to me about it as he was hauling it away?

Q. You had seen it down there on the Mail Dock?

A. I had seen it myself; that was on the Steuart Street wharf; none of that was on the Mail Dock at all; there was a matter of between 4 and 5 hundred, of course, I could not tell the exact number of bags, that were on the Little Mail Dock, of the Brandenstein that went into the California warehouse on Brannan Street, and all of that that was on the Steuart Street dock went into the Humboldt warehouse. All of that that was taken out at the Steuart Street dock went to the Humboldt warehouse, for the simple reason that to haul it to the California from there would be too far.

Q. You made no comparative tests of the two?

A. No, sir. I tell you the coffee was sold; I had no chance.

Q. It was on the dock until the 9th?

A. I know, but I had no right to touch the coffee, because that did not belong to me, and I did not want to have them say I had tampered with it. It was

(Testimony of F. B. Oliver.)

time enough for me to do that when they called on me to make an adjustment and appraisement of that.

Q. Do you mean you would have committed a grievous offense if you had taken from a bunch of 1100 sacks, say, four or five grains?

A. No grievous offense at all, but I did not want any question to come up, to say that I had tampered with it, or passed an opinion on it, unless in the presence of the owners of that coffee.

Q. Did you ever call on the owners to come down with you?

A. No, I did not; it was for them to notify me.

Q. That, of course, is your opinion?

A. Yes.

Q. The coffee lay down on the dock then from the 30th or 31st of January until the 9th of February?

A. When it was taken away I don't know.

Q. The report you gave us the other day is correct, is it not? A. Yes, sir.

Q. That means to say it was there for 10 days. You knew that this oil damage had been suffered long before the vessel had arrived, that she had been in trouble? A. Quite naturally.

Q. As soon as you took off the hatches?

A. I was there then.

Q. You were there at that time?

A. I was there.

Q. You knew the coffee had been injured?

A. I did.

(Testimony of Leon Lewin.)

Q. And yet you delivered it to the various consignees without having made any test?

A. No, I won't say that, because when they came there they told me it was damaged, and I said I knew it.

Q. What I mean to say is you delivered it without making any tests or taking any samples?

A. Certainly.

[Testimony of Leon Lewin, for the Respondent.]

LEON LEWIN, called for the respondent, sworn.

Mr. KNIGHT.—Q. Mr. Lewin, you are a coffee broker, are you not?

A. No; coffee jobber; importer and jobber.

Q. And you were such during the year 1907, were you not? A. Yes, sir, I was.

Q. Do you recollect buying a quantity of damaged coffee marked "J. N. J.," that had, as far as you know, reached this port by the steamer "Santa Rita," consigned to Leege & Haskins?

A. Yes, sir. About the mark, I can't recall that. I presume that is the mark. Have you got it there? I have not got it in my mind.

Q. I am simply taking it from Mr. O'Brien's testimony. I suppose that is correct.

A. He has got the marks; I copied them, and I can give you the marks; it is the same as his because he gave them to me.

Q. You bought that from Mr. O'Brien, Mr. Lewin? A. He acted only as a broker.

Q. Mr. O'Brien handled it as a broker?

A. Yes, sir.

(Testimony of Leon Lewin.)

Q. Mr. E. H. O'Brien?

A. He submitted the samples, and he in fact took me down to look at the coffee; he was the broker in the matter.

Q. He was a broker and he bought it for your account?

A. Yes. You know he could not buy it without my sanction. You know I made an offer on the proposition, and he submitted the offer; he only acted between us.

Q. He was simply the agent, that is all?

A. The agent for both parties.

Q. Well, this offer came to you from him. It don't make any difference whether he was acting for you or for whom he was acting. I simply want to get at the fact; you bought it through him?

A. Yes, sir.

Q. I am not going into the question of the legal relations of Mr. O'Brien. You paid, what was it, 5¼? A. 5¼ cents.

Q. Do you remember the date when you purchased that, Mr. Lewin?

A. No, I gave it to Mr. Oliver. I gave him a copy of the whole proposition on a piece of paper.

Mr. KNIGHT.—Have you the date, Mr. Oliver?

Mr. OLIVER.—It is on that brown piece of paper.

The WITNESS.—I gave him the date of the purchase. I gave him all of it to avoid coming up here; so there would not be any question about it, I gave him the whole thing about it.

(Testimony of Leon Lewin.)

Mr. KNIGHT.—Q. (After examining the paper.) I do not see any date on it.

A. The 9th of February; that is my recollection of when I paid the bill.

Q. It was the 9th of February when you paid the bill? A. Yes.

Q. You remember you bought it a short time prior to that?

A. Two days.

Q. Two or three days prior to that time?

A. To the best of my recollection; it might have been a day or two more.

Q. Do you remember, Mr. Lewin, when O'Brien first called your attention to that coffee, or was he the first one that called your attention to it?

A. Well, Mr. O'Brien, as far as I can understand, he showed that coffee to different parties, and I refused to make him an offer, so he called on me to look at the coffee, but I would not make an offer on it.

Q. He did call it to your attention then, did he?

A. Yes.

Q. Do you recollect how long before you purchased it it was that he called the coffee to your attention?

A. Well, that took probably two days, and the next day I made up my mind whether I wanted it or not; there was a day between.

Q. You took two or three days to consider the proposition?

A. One or two days, I would not say exactly.

Q. You went down and looked at it yourself?

(Testimony of Leon Lewin.)

A. Yes.

Q. Then you authorized him to buy it?

A. I made him an offer.

Q. And he accepted it? A. Yes.

Q. Did you sell that coffee again, Mr. Lewin?

A. Yes, sir.

Q. At what price did you sell it?

A. Well, if I would not have to answer that question, I would not like to answer it. If I have to, I will answer that question.

Q. Mr. O'Brien has testified regarding the matter, as to its retail price. Let me ask you this, Mr. Lewin: This coffee was resold through Mr. O'Brien by you, was it not? A. Yes, sir.

Q. And is it not a fact that he resold this coffee at 6¾ cents on your account?

A. I believe that is the price I sold the coffee for, but I must call your attention to the fact that—

Q. I am not going into the question as to whom you sold it or anything of that kind.

A. I could tell you the whole thing.

Q. If you don't care about going into it, I do not care anything about going into it. I simply want to get at the main facts.

Mr. DENMAN.—Q. You may explain the whole thing, Mr. Lewin.

Mr. KNIGHT.—Q. Very well, go ahead then.

A. Well, as soon as my attention was directed to that coffee I went and looked at it with Mr. O'Brien, and it looked like damaged coffee, what they call damaged coffee, and I made up my mind I would take

(Testimony of Leon Lewin.)

a chance at that coffee. I looked at it and I made Mr. O'Brien a bid of 5¼ cents. Mr. O'Brien went with that bid to the insurance company, Mr. Theobald—

Q. Did you go with him? A. No.

Q. I am only going to ask you to tell what you know.

A. I am going to tell you how that was. Mr. O'Brien went to Mr. Theobald with that sample. Fifteen minutes after I made that offer I went home and made a roast. I got a little in the machine to make a roast; I gave it another test. I called in the joint broker that lives right next door to me, Mr. Werlin, and I says, "George, what do you think of that coffee? I made a bid of 5¼ cents." He said, "You are stung; I would not give you 2 cents for it." So I went to the 'phone and I called up O'Brien. You know that was 15 or 20 minutes, while I was looking at that coffee; you know that was a final test. So I went and called Mr. O'Brien up on the phone, and Mr. O'Brien, he was not in his office. I asked the person there where Mr. O'Brien was, and he said he went up to the insurance company. I called him up there at Mr. Theobald's, and I got him there, and I said, "Have you made that offer?" and he said "Yes." I says, "Can you withdraw that offer?" and he says, "No, it is a custom in the coffee trade that if you make an offer you can't withdraw it; that is, in the nature of the business, it would not be honorable to do it, and that is my principle, not to do anything that is not honorable even if I would lose

(Testimony of Leon Lewin.)

the whole cargo; he said I could not withdraw it once I made it and they accepted it. I felt very bad that I couldn't withdraw it, when he said I couldn't withdraw it. That is all I know about the coffee.

Q. That feeling of sadness was somewhat assuaged when you disposed of it at 6¾ cents?

A. Yes, but the thing cost me an enormous amount of money to get it in shape. I had to take it away at night; it might be condemned by the authorities.

Q. Who said they were going to condemn it?

A. On account of Brandenstein, who the insurance company did not settle with; they did not want to pay him, on account of this policy. His policy was different from that of Leege & Haskins and Schillings.

Q. He had an English policy?

A. He had some trouble with the policies, so his brother, who is an attorney, said they would condemn it. And naturally if they would condemn his cargo they would condemn the cargo that I bought.

Q. So that you had heard that Henry Brandenstein had stated to his brother that the government could condemn that coffee, or that it could be condemned, did you?

A. I heard that; there was a rumor that the coffee could be condemned; it was Mr. Brandenstein, I surmise, their attorney, who told them that.

Q. Brandenstein naturally wanted to make that a total loss so as to recover on the policy.

(Testimony of Leon Lewin.)

A. I suppose so, and naturally he would. But such coffee could be condemned. I could go now and condemn lots of coffee or other goods in this market.

Q. You could condemn, you say?

A. You can condemn any line of goods, you can condemn any merchandise; you can go into a store and you can condemn salmon; you can condemn any merchandise, any fish, or anything, if you try to go after them.

Q. How long after our purchase of that coffee did you resell it, or did Mr. O'Brien resell it for you?

A. I will tell you how the thing was worked. When I heard that, in the first place the Hazlett Warehouse refused to take coffee in any of their warehouses, because it was a fact that that was not oil in it, that was creoline; oil would not damage the cargo; it was creoline or some of those disinfectants was on that coffee—creosole or creoline, I don't know the word for it; it smells like a disinfectant.

Q. What warehouse refused to take it?

A. The Hazlett Warehouse was the only warehouse; they owned all the warehouses here, and they say they cannot put it in their warehouse.

Q. So the Hazlett Warehouse refused to take it?

A. Yes, and they suggested to me that they had a separate warehouse made out of sheet iron, or whatever you call it; they said that was empty and they said they would put it in that warehouse for me.

Q. Where was that warehouse?

A. Well, it was not far from there, probably 10 or 15 blocks from there, where they had a shed, you

(Testimony of Leon Lewin.)

know, they call it a shed, galvanized iron shed, where they stored that coffee; that was alone there.

Q. So you stored the coffee there, did you?

A. I stored the coffee there, and I got people working there day and night, dumping out the coffee and filling it in new, good bags, buying new bags and refilling it, and I shipped it out of the city, and I shipped it to St. Louis.

Q. Did you sell that coffee before it left here or after? A. No, no; after.

Q. Do you remember when you shipped that coffee out of here?

A. I don't remember the date, as fast as I could load it into the cars to ship it out of the state.

Q. You shipped it out as soon as you could?

A. Yes, sir.

Q. You sold it how many days after you had shipped it?

A. It generally takes four or five days before the samples reach them. You know when we ship it we mail the samples by express, and that takes four or five days before the express reaches them, and it took about 7 or 8 days in all.

Q. And you sold it on the samples?

A. On the samples I sold it.

Q. Did you sell it at different places or one place?

A. I sold it to one place, one broker.

Q. Away from San Francisco? A. Yes, sir.

Q. What was the expense attendant on the handling of that coffee, Mr. Lewin? Have you that statement?

(Testimony of Leon Lewin.)

A. This is not right, this statement. There is a whole lot more expense attached to that thing.

Q. What was the amount you paid the warehouse?

A. Well, the warehouse charges, with the sacks, was over $1,000, to the best of your recollection.

Q. Have you your books to show that?

A. Well, by digging it up, I could probably dig that up.

Q. I shall have to ask you, Mr. Lewin, to show us your books, as to how your claim is made up. We have a statement made up, let me tell you, as far as could be from the Hazlett Warehouse Company, which Mr. Oliver got showing an expense which you paid to that warehouse of $427.74.

A. Was that the original bill?

Q. The original bill was $458.60, the total charge, and then it was reduced to $427.27, which included hauling, 1,874 bags—

Mr. DENMAN.—One moment. I suppose it is understood I object to all this line of testimony on the ground that you cannot show the value of coffee in San Francisco by showing a warehouse charge or what it was sold in St. Louis or some other place for.

Mr. KNIGHT.—Q. There were some of the bags that were torn?

A. We did not use one old bag; we had to change all of the bags.

Q. How many bags did you change, Mr. Lewin?

A. I could not tell you; I changed the whole cargo; every bag was resacked.

(Testimony of Leon Lewin.)

Q. How many bags did you pay for?

A. I could not tell you; I bought all the sacks that I had to buy—I had to buy all of them. There was a value to those sacks; I had to replace them.

Q. Did you replace all of the sacks in which that shipment originally came here? A. Yes, sir.

Q. And did you pay the Hazlett Warehouse for them? A. I bought them outside.

Q. You bought them outside of the warehouse?

A. Yes, sir.

Q. How many bags?

A. Whatever I was short, or maybe I had them in stock; I always have got 5 or 6 hundred bags of my own, sacks that sold at or had a market value of from 8 to 9 cents apiece.

Q. Maybe we can shorten this a little; how many bags did you pay for outside of the Hazlett Warehouse? A. I can't tell you.

Q. Well, your books will show that, will they not?

A. Yes, sir.

Q. Your books would show any charge or any expense that you incurred outside of the expense incurred at the Hazlett Warehouse, would they not?

A. No—if I had that on file, it would show. I put the coffee in the expense account of the Hazlett Warehouse. Now, it may be that will show that. If it does, I will be only too glad to let you have it.

Q. Your Hazlett Warehouse expense account apparently shows $427.74.

A. My ledger account shows $4,900 I paid to the Hazlett Warehouse.

(Testimony of Leon Lewin.)

Q. Four thousand nine hundred dollars?

A. Yes, for the year.

Q. I am speaking with reference to this shipment?

A. I don't think I can segregate it; if such a thing is so and I can do it I will be only too glad to segregate it and find it out for you.

Q. Your books show then the payment of $4,900 to the Hazlett Warehouse for the year for storage; is that the idea?

A. Storage and mixing charges.

Q. How long did you have this stored in the warehouse?

A. This was not in the warehouse at all. This would be thrown in the same thing; it would go under the same heading, this expense account.

Q. Would the expense in connection with this coffee appear in that $4,900 item? A. Yes, sir.

Q. How would it be itemized?

A. I will tell you what we do. We paid $490 to Hazlett this month—the Hazlett Warehouse Company; $490, that goes to coffee expense; that is added to the coffee value, you know.

Q. You say you paid that this month on coffee that is in the warehouse: is that the idea?

A. Suppose I were to pay out $490. Just for argument sake, take that, that we paid Hazlett $490; that goes into the account against the coffee.

Q. Of course any expense would go against the coffee, but would that be expense for storage?

A. For storage and mixing.

(Testimony of Leon Lewin.)

Q. How much of that $4,900 is chargeable to this particular consignment, the Leege & Haskins coffee?

A. The whole thing what we paid to Hazlett, or it might have been entered up in the whole total of the month; maybe that month I paid $1,200 or $1,400 or $900; I don't know about that.

Q. Mr. Lewin, you have your books in such a shape you can tell any shipment of coffee what the expense has been? A. The warehouse expense.

Q. So you can calculate on any given shipment how much you make or lose?

A. Not on so many bags as that. You could make it on 40 bags of coffee, all right; I will take 40 bags and give it to you in a second, what the charges are.

Q. Why can't you tell me in a second what the charges are on 1,067 bags?

A. You want it to the pound; I can't give it to the pound to you; it is about two years ago, and I can't give you what I paid to the Hazlett Warehouse for that now. I could look it up and tell you how much I paid the Hazlett Warehouse that month.

Q. I am afraid we shall have to ask you for your books, if we can not get any more details here. We have this charge of $427.74 made for hauling the coffee, and we have a certain quantity of bags.

A. Is the bags included with that?

Q. No.

Mr. OLIVER.—I had added $300 to that for the bags alone.

Mr. KNIGHT.—Q. What is this item, 1,574 bags?

(Testimony of Leon Lewin.)

Mr. OLIVER.—That is the total of what he bought.

The WITNESS.—What have you got there from Hazlett?

Mr. KNIGHT.—Q. We have the original charge of $456.60; that was the original charge, and that amount was reduced to $427.74?

A. And what else have you got?

Q. That is all. A. And the sacks.

Mr. OLIVER.—I estimated the bags would be worth $300.

The WITNESS.—That would make it $727?

Mr. OLIVER.—That would make it, say, in the neighborhood of $750.

The WITNESS.—That is what you want to get at. I will say that is right, for argument's sake.

Mr. KNIGHT.—Q. That that would make it, with the bags, about in the neighborhood of $750, the expense to which you were subjected in handling that shipment?

A. Yes. Well, then, have you that list I gave to you (addressing Mr. Oliver). I want to read off some other expenses that go with it. I will take it, for argument's sake, that that is right. I don't want to have to come around here again unless I have to. Say for argument's sake that is right. Loss in weight, have you figured on that?

Mr. OLIVER.—I don't know what the weight was you sold.

Mr. KNIGHT.—Q. What was the weight of the coffee you sold? Have you got a memorandum of that?

(Testimony of Leon Lewin.)

A. Give me the list. I can telephone for the loss of weight and get it here in five minutes.

Q. Can you get now over the phone the weight that you have sold? A. Yes, I think so.

Q. I would like to get the weight of the cargo, which would be the amount you received; dividing that by 6¾ cents would give the weight, I presume.

A. You can take it at 5¾—what I paid for it.

Q. Very well, take it at 5¾, and what you sold it at, 6¾.

A. You don't want the brokerage? There is brokerage on that cargo.

Q. What other expense, if any, did you incur besides that estimated expense of $750 that Mr. Oliver has allowed? A. I paid a double brokerage.

Q. You paid a double brokerage?

A. Yes, sir.

Mr. DENMAN.—Q. How much does that amount to?

A. Well, it amounts to, if it was taken at 15 cents a bag, it was probably $225 on that cargo.

Mr. KNIGHT.—Q. You paid a brokerage—is that to Mr. O'Brien?

A. Yes, and I paid a brokerage to the fellow in St. Louis; he also got 15 cents a bag; that makes it 30 cents.

Q. Thirty cents a bag?

A. Yes, 30 cents a bag brokerage.

Q. Let us see what you actually did pay in brokerage, Mr. Lewin. You paid in the first place a brokerage to O'Brien, did you?

(Testimony of Leon Lewin.)

A. Yes, 15 cents a bag.

Q. When you purchased it?

A. No; when he sold it for me.

Q. You paid him a brokerage of 15 cents a bag; is that right?

A. Yes; he has got to pay 15 cents to the broker in St. Louis; I had to pay that too.

Q. Then the total brokerage you had to pay on it was 30 cents a bag?

A. Yes. If you will tell me what you want I can probably get it in a minute for you over the phone. (After telephoning.) He is not there.

Mr. DENMAN.—Q. As I understand it the $750 was for mixing the coffee and the bags?

A. Yes.

Q. Mixing charges and bags? A. Yes.

Q. How about your drayage?

A. Say the whole thing together is that.

Q. In the $750? A. Yes.

Mr. KNIGHT.—Q. You paid a double brokerage, you say? A. Yes.

Q. Was that all?

A. Well, there was interest charges, too.

Mr. DENMAN.—Q. What would the interest charge be?

A. Well, from the time I put my money out until I got the returns back; say half a month at 6 per cent, for account of money that I invested.

Mr. KNIGHT.—Q. You don't remember just when it was you sold that coffee, do you?

(Testimony of Leon Lewin.)

A. How long it was.

Q. How long you were out your money?

A. I could not tell you. You know those things are paid for by sight drafts; it took 8 or 9 days for the samples to get acted on. Say, roughly, 14 or 15 days.

Q. Didn't you send those samples on before you bought it?

A. No —before I bought it? I couldn't have got the samples before I bought it.

Q. You think you were out your money about half a month?

A. Probably a little less; probably 13 days.

Q. We will call it 15 days; half a month would be a quarter of a per cent.

Mr. DENMAN.—Q. On how much money was that? Is this 1528 short, the shortage in weight that you referred to—is that the shrinkage?

A. That is the shrinkage.

Q. How much is that?

A. 1528 pounds short.

Mr. KNIGHT.—Q. Whom did you get that from? Is that your memorandum?

A. Yes. That was what I bought and what I received.

Mr. OLIVER.—$16,495.28; that is the whole thing. That was the face of the bill.

The WITNESS.—I got that from my bond.

Mr. KNIGHT.—Q. You paid, then, $16,495.28 for the coffee? A. Yes, sir.

Q. You sold it for how much?

(Testimony of Leon Lewin.)

A. What, the coffee?

Q. Yes.

A. I don't know; I have not got that, you know.

Q. Was that shortage of weight made up by the ship?

A. I could not tell you. I bought it on the invoice weight.

Mr. DENMAN.—Q. That is 152,764 pounds?

A. I could not tell you how much I sold.

Mr. KNIGHT.—Q. How much did you sell?

A. That is what I will find out.

Q. Mr. Lewin, perhaps I can get at it this way: do you remember that there were delivered to you 31 bags of coffee afterwards? A. Yes.

Q. Didn't that make up the shortage?

A. No.

Q. What was the shortage after that delivery of that coffee?

A. Well, offhand I could not tell you; it must have been about 2 or 3 thousand pounds.

Q. Well, your books will show that, won't they?

A. The only way I can arrive at that is what I paid for and what I sold.

Q. That is about the only way you can get it, from what you paid for, the pounds you paid for and the pounds you sold? A. Yes.

Q. You can make up a statement of that and you can give it to me or to Mr. Oliver?

A. Mr. Oliver can come down with me and I will give him the whole thing. I can tell him then what day it went out.

(Testimony of Leon Lewin.)

Mr. DENMAN.—Q. Now, Mr. Lewin, how large a sample did you send on to St. Louis; was it a very large one?

A. That was a 5 pound sample; I took about a 5 pound sample.

Q. Out of about 1500 bags? A. Yes, sir.

Q. That was not much of a sample, was it?

A. Well, it is a pretty fair sample.

Q. Out of 1500 bags? A. Yes.

Q. Do you know anything of the subsequent history of that coffee, whether it had been sold or not?

Mr. KNIGHT.—To which we object, what the history of it is.

A. I do. I was informed that the party that bought that coffee could not dispose of it—

Mr. KNIGHT.—We object to that as hearsay.

A. (Contg.) For a whole year or more. Whether he has got it yet I don't know, but I know that coffee could have been bought for less money than I paid for it; that I know. I suppose they bought it thinking they would do something with it too.

Mr. DENMAN.—Q. Now, there is no regular market for that sort of coffee, is there?

A. No. It is merchandise, and whoever buys it is liable to get soaked.

Q. There is a gambling chance in it then?

A. Yes, there is a chance to it.

Q. That gambling chance is made up by the possibility of condemnation by the Government; that is one of the elements of the gamble?

(Testimony of Leon Lewin.)

A. There is something to that. But most of the people they don't trade in those articles, not a reputable house.

Q. No reputable house would? A. No.

Q. As a matter of fact, such coffees are usually worked off, are they not, by mixing them?

A. By mixing it, or giving it to the sailors or South, New Orleans—those colored men and those on the seal boats, and so on; half the time they don't know what they are drinking.

Q. How long have you been a coffee broker?

A. I have been in the coffee business for 25 years.

Q. Did you ever grow coffee?

A. Well, I owned once a plantation—no, I would not say I growed coffee; I know all about it.

Q. Now, let me ask you: in view of your knowledge of this coffee, the information that you gained as an expert since then, and the history of the coffee, and your general expert knowledge on coffees, do you think 5¼ cents was a fair price for the coffee at the time your purchased it?

A. By all means. I would not buy it to-day if that thing were repeated; I would not buy it by no means.

Q. Then, as I understand you, you consider it a lucky chance that you got rid of it?

A. It was a lucky chance with me that I got rid of that coffee.

Q. Do you think that you sold it at a price higher than the fair market value at San Francisco?

A. When I sold it?

(Testimony of Leon Lewin.)

Q. Don't you think that you sold it at a good deal more than the market rate?

A. You could not dispose of it here at all.

Q. You could not dispose of it here at all?

A. No, sir.

Q. That is to say that coffee had to be taken to some place where they could work it off in job lots?

A. Yes, chance sales for damaged articles. Now, some people you could never get to buy that; people who never buy a damaged article, because they won't take anything that is damaged; other people will buy it.

Q. What was the name of this other broker who said to you that it was not worth 2 cents?

A. Mr. Wirlin.

Q. Was there any discussion in the coffee market regarding this St. Louis coffee at that time?

A. Well, they said, "Lewin got soaked again."

Q. That is, referring to yourself, I presume?

A. Yes, that was referring to me.

Q. As a matter of fact, you managed to pass that along to St. Louis; that was the chance of it, was it not? A. Yes, sir.

Q. Did you get any offer from any other city for that coffee? A. No, sir.

Q. How many places did you send your samples to?

A. New York, Chicago, St. Louis, Kansas City, and I believe to five or six places.

Q. You never heard from any of those?

A. No, sir.

(Testimony of Leon Lewin.)

Mr. KNIGHT.—Q. You hardly had time to hear from the other samples before you had sold it?

A. They got their samples, but as that man made me the offer he got it.

Q. The fellow in St. Louis wired you an offer?

A. Yes, by all means; everybody wires; you don't wait for letters to do business; all business is done to-day over the wire.

Q. As soon as this man in St. Louis got the sample he wired you an offer of 6¾ cents?

A. He wired an offer of 6¾ cents and he got it.

Q. You wired an acceptance? A. Yes, sir.

Q. So then the fellow who was not doing business by wire did not have a change to get that coffee?

A. Nobody does business by letter in the coffee trade. There is no one man that I send a sample to that I don't get a wire in five days—if I don't get a wire in five days then he don't get them any more.

Q. Mr. Lewin, how do you know that you could not dispose of that coffee in San Francisco?

A. In San Francisco?

Q. Yes. Did you try to dispose of it?

A. No; I will tell you the reason why: Mr. Folger, Mr. Schilling, Mr. Brandenstein and Mr. Hills and all those big reputable houses, they would not buy such coffee; they would never buy that damaged coffee.

Q. Did you go around and ask them?

A. Oh, I know; the same as you would not go around and buy a damaged thing.

(Testimony of Leon Lewin.)

Q. So you assume because the coffee was damaged they would not handle it?

A. I know they wouldn't handle that damaged coffee.

Q. Therefore you assumed it was useless to go to them? A. Yes, entirely useless.

Q. Did you ask Mr. Cambron if he would like to get the coffee?

A. I had nothing to do with Mr. Cambron; he was a broker just like Mr. O'Brien; Mr. Cambron is a broker, and he has sold coffee for me. If I have got any coffee, and Mr. O'Brien takes the samples and goes around and shows it to the people, that is out of his hands.

Q. Still why didn't you exhaust the coffee buyers here in San Francisco, that is the people that you thought might have handled the coffee before you sent the samples on to these eastern cities?

A. It would have been a detriment to me, a big detriment.

Q. A detriment to hawk the coffee about?

A. It would have been a detriment to me, to sell such coffee; they would be saying, "Lewin is selling unsound coffee." That is all my competitors would want me to do, to do that.

Q. So that you did not want to get the reputation of handling coffee that had been damaged?

A. That is the whole thing.

Q. You wanted to get it out of here as soon as you could? A. That is it exactly.

(Testimony of Leon Lewin.)

Q. Sort of save your reputation in the community?

A. Yes, at least I tried to, and I tried to make anything honorable out of it. Now, talking about this thing here, I will tell you about a thing I had. I had 900 bags of coffee of the same nature and I lost $4,000 on it just six months before that on the same kind of a deal. I bought it and paid $4,000 out of my pocket on the same kind of a proposition.

Mr. DENMAN.—Q. Then such speculations are largely speculative in their nature?

A. Yes. I lost the $4,000 in one transaction, on 900 bags of coffee.

Mr. KNIGHT.—Q. You felt you could get even on this shipment?

A. I didn't feel sure, but I took the chance. You understand I am entirely out of this thing, either with the insurance company or Leege & Haskins, and I want to do the right thing; I don't care what way the case goes, because I am not interested in it at all.

Mr. DENMAN.—Q. As I understand, you received some sweepings later on? A. Yes.

Q. Were they in as good condition as the other?

A. No. That was, you know, the same coffee with dirt in it, and it had to be fanned and all that. I sent it to the Hazlett Warehouse to have it fanned out, the dirt and stuff that gets in it from the bottom of the ship and around the wharf.

Mr. OLIVER.—Q. Where did that go?

A. In the Southern Pacific. You asked me about that the other day.

(Testimony of Leon Lewin.)

Mr. DENMAN.—Q. What became of that coffee? A. It was delivered to me.

Mr. KNIGHT.—Q. And after that?

A. After that, I know I had 1500 pounds; I had it fanned and cleaned; I remember that at one time there was a sailing vessel that wanted some strong coffee, and I sold *it one* of those commission merchants here; I sold it to them; I sold one man 900 pounds, and so on.

Q. You retailed it?

A. Yes. That went out with the sailors, going north, who wanted strong coffee.

Q. They wanted something that would stay by them? A. Something that will smell.

Mr. DENMAN—Q. They wanted an oily coffee for an oily voyage?

A. You know they want strong coffee, those fellow that go north.

Mr. KNIGHT.—Q. How much did you sell that coffee for?

A. Probably 6 or 7 cents; something like that; I don't know exactly.

Q. Couldn't you tell us a little more exactly?

A. Well, if it would be any benefit I could tell.

Q. We do not care to know who it was.

A. Well, in the neighborhood of from 6 to 7 cents; it might have been 7, and it might have been 6.

Q. Are you sure it was not more than 7 cents that you sold any of that coffee?

A. Yes, that I am sure of.

(Testimony of Leon Lewin.)

Mr. DENMAN.—Q. That was sold in small quantities, comparatively small quantities?

A. Of course, the whole thing was not very much.

Mr. KNIGHT.—I would suggest that Mr. Oliver and Mr. Lewin examine the books and get some statement up as to these expenses. Unles there are some further questions to ask, I do not care to have Mr. Lewin back.

Mr. KNIGHT.—Q. Let me ask you this: Couldn't you have done better with this coffee if you had held it in San Francisco for a while, Mr. Lewin, instead of sending it immediately away from here? That is, providing you were not looking out for your reputation as a jobber in damaged coffee—aside from that; looking at it entirely from the dollar and cents proposition?

A. I cannot answer that question; that is a question nobody can answer. It is the same thing as if you would go and buy so many stocks; you would take the first good bid you got when you sell them. I was always of the impression that I was soaked on that coffee; that was always my impression, and it is even to-day.

Mr. DENMAN.—Q. Now, as a matter of fact, there is no market for that kind of coffee here in San Francisco, is there?

A. Well, I will tell you; take this coffee, for instance; if a fellow wanted to take advantage of another fellow and hides it and dishes it out by small parcels, you could fool somebody with it, and of course you could get more money out of it; you know

(Testimony of Leon Lewin.)

if they didn't know anything about the coffee and came there and bought it you might fool them and get more money out of it; you hand them a package.

Q. When you use the word "fool" you mean cheat somebody with it?

A. That would be about it, about the size of it, because if I sell you something which is no good and you go home and find that out, why you feel you don't get a square deal.

Mr. KNIGHT.—Q. Don't you suppose those people in St. Louis would blend or mix it with other coffees? Isn't that the way they ultimately put it upon the market?

A. That is the only way they could get rid of it.

Q. That is the only way they could dispose of it?

A. I would not do it; if they want to take the chance, let them do it; I wouldn't. Of course, you know some people can sell anything; they can go out and sell bricks for $1; somebody will buy bricks for that. I won't handle it and the trade won't handle it. I know that. While the coffee, some of the coffee would bring more money, if you take 2,000 bags and try to sell it you couldn't dispose of it; even a coffee man knows that. Do you think a fellow could sell that coffee in that way in bulk?

Mr. OLIVER.—I would not have attempted to sell it in that way.

[Testimony of F. B. Oliver, for the Respondent (Recalled).]

F. B. OLIVER, recalled.

Mr. KNIGHT.—Q. How would you have disposed of such coffee?

A. I would put it in a warehouse; I would not have sat and worried about that.

Q. Do you think if it had not been disposed of as quickly it would have brought a better price?

A. Yes.

Mr. DENMAN.—Q. In other words, in the manner Mr. Lewin has described it?

A. Certainly. There is nothing injurious to the coffee, absolutely nothing injurious; it simply loses its taste.

Q. Simply a question of getting into a man's stomach without passing through his nose.

Mr. LEWIN.—That is about it.

Mr. KNIGHT.—Q. It was not coffee that was deleterious to health? A. No, sir.

Mr. LEWIN.—You know if you take coffee like that, say five bags and mix it, and if you make coffee you will get a cup you don't like; maybe the next cup will be better.

Mr. DENMAN.—Q. You know some people like coffee with chickory in it?

A. Chickory has a good flavor in it, but this was all gone.

Mr. OLIVER.—No flavor at all.

Mr. KNIGHT—Then a man would have to drink a quantity of it to—

(Testimony of F. B. Oliver.)

Mr. LEWIN.—It was there; no question of it. I had it in the sun; it never went out of it. I had it in the sun for six hours. I wanted to test it myself; I wanted to put it in the sun like they do raisins here, I thought maybe the sun would take that out, but it was still there.

Mr. DENMAN.—At the end of six hours the odor had not gone out?

Mr. LEWIN.—The odor had not gone out.

Mr. KNIGHT.—Mr. Denman, what time did you receive that sample, or where did you get that sample you offered in evidence here the other day, from whom?

Mr. DENMAN.—I got that sample from O'Brien's office.

Mr. KNIGHT.—Given to you as a sample of this Leege & Haskins coffee?

Mr. DENMAN.—Yes.

Mr. KNIGHT.—Do you remember how long ago it was that you got that sample?

Mr. DENMAN.—It was shortly after the time it came into the office.

Mr. KNIGHT.—That would be along in February, 1907.

Mr. DENMAN.—Yes. I had that in the paper bag for about two weeks. I then sent my clerk out and got a fruit glass with a tight tin top on, and I left some in the bag and I put the remainder into the glass, and it was the glass and bag I put in evidence.

Mr. KNIGHT.—You put in evidence the glass and the stuff in the bag.

(Testimony of F. B. Oliver.)

Mr. DENMAN.—Yes. The stuff in the glass had retained its odor; the stuff in the bag had lost much of its odor, although when taken in the hand it would still come out, and it was quite noticeable to the test.

Mr. KNIGHT.—Where were these samples kept, the two samples?

Mr. DENMAN.—They were kept in the safe in my office.

Mr. KNIGHT.—The coffee that was kept in the glass jar, was that kept closed?

Mr. DENMAN.—No. I opened it three or four times to see whether the odor still remained in it.

Mr. KNIGHT.—I mean it was not kept open in the meantime.

Mr. DENMAN.—No.

Mr. KNIGHT.—You got that along in about the month of February, 1907.

Mr. DENMAN.—Yes.

Mr. KNIGHT.—As far as we are concerned, that will probably close the evidence, that is, when we have got that statement from Mr. Lewin showing the brokerage on the coffee, the amount of coffee which he sold, and the amount which he bought.

Mr. DENMAN.—Mr. Lewin, we want every item that entered into it; every item that entered into the cost of this particular consignment.

[Testimony of Leon Lewin, for the Respondent (Recalled).]

LEON LEWIN, recalled.

Mr. DENMAN.—Q. (Handing a sample to the witness.) Can you taste it?

(Testimony of Leon Lewin.)

A. That coffee has improved wonderfully.

Q. Can you taste it at all? A. No.

Mr. DENMAN.—I can.

Mr. KNIGHT.—I cannot.

Mr. DENMAN.—Q. Can you taste it?

A. No, sir.

Q. Mr. Lewin, now that you have chewed this up, can you notice the odor of the chemical?

A. Yes, I can after a while. It is not as bad as it was; it was better than it was.

Q. Now, take that, Mr. Lewin (handing)?

A. Yes, there it is.

Mr. KNIGHT.—Q. You are showing him the stuff that has been kept bottled up?

A. Yes, that is it.

Mr. DENMAN.—Do you smell that, Mr. Knight?

Mr. KNIGHT.—I can smell some substance that is foreign to the coffee.

The WITNESS.—That is not oil. That is creoline or creosote.

Mr. KNIGHT.—Q. Now take one of these beans which is taken from the bottle which has been kept sealed up.

A. (After examination.) There is no comparison between the two. You know they will lose the flavor and take it on again. If you store coffee with pepper the coffee odor will go in with the pepper smell and then loses it again.

Mr. DENMAN.—Q. It draws from it and then it loses it? A. Yes.

(Testimony of Leon Lewin.)

Mr. KNIGHT.—Q. You have tasted the coffee in the bag. Does it retain any of the taste of the chemical that affected it? A. Slightly.

Q. Would that affect the sale of the coffee in the market to-day?

A. Coffee like that, yes. You have got to roast it and see whether it is in the coffee; if that don't show up in the cup that would not affect it.

Q. Now, how about the stuff in the glass here; is that substantially in the same condition as when it was when it came off the ship?

A. It was worse than that.

Thursday, March 18th, 1909.

LEON LEWIN, recalled.

Mr. KNIGHT.—Q. Mr. Lewin, what books have you got there?

A. I have all the books that I can produce.

Q. You keep a warehouse book, don't you?

A. You bet you.

Q. Will you examine your warehouse book and state the amount of coffee that you put into the warehouse?

A. I have not got that in my warehouse book. That was an exceptional case, because the warehouse would not take it, and I turned it over to the Hazlitt Warehouse, and that was never entered into the warehouse book. All the entries that I have is here.

Q. Did you make any note of the amount of coffee you purchased through O'Brien?

A. Yes, sir.

(Testimony of Leon Lewin.)

Q. How much coffee did you buy through O'Brien?

A. I bought from Mr. O'Brien 391 bags marked G. S.

Q. When was that?

A. I have got in my book February 7th; that was when I entered it in my book.

Q. That is when you entered it in your book. When did you buy it?

A. I gave this gentleman (pointing to Mr. Oliver) all the details, and I was looking over my papers for it this morning and I can't find it. I gave him all the details of the purchase. You can find it from the Bickford contract.

Q. Does the book show a purchase on either February 5th or February 6th of coffee through O'Brien?

A. No, sir. The record that I have got I will give you, the marks and everything.

Q. Covering what length of time, all on the same date?

A. It might have been purchased the same day. There was purchased the coffee in two parcels, one was from the New Zealand and one from the Canton Insurance Company, Ltd.

Q. Now, what did you purchase from the New Zealand?

A. Well, add them up. From the New Zealand 391 bags and 124 bags; that is all, it says here, marked G. C. St. L.; 391 marked G. C. and the 124 marked St. L.

Q. A total of 515 bags?

(Testimony of Leon Lewin.)

Mr. DENMAN.—Q. That is New Zealand.

Mr. KNIGHT.—Q. That is from the New Zealand? A. Yes.

Q. Have you got the weights there of the bags?

A. No, they never gave me weights. I bought these coffees by the invoice weights, which invoices you have got. You can get the originals from the insurance companies.

Mr. KNIGHT.—Have you got that invoice with you, Mr. Denman?

Mr. DENMAN.—No.

Mr. KNIGHT.—Q. What is the Canton?

A. The Canton was 983 bags of coffee.

Q. Marked how?

A. U. S. That is the way I remember it.

Q. The weight is not given there?

A. I bought from the Canton the following lots, 53 bags of E. V.

Q. Is that in addition to the 983? A. Yes.

Q. 53 marked E. V.?

A. Yes. 23 marked S. S.

Q. Is that the total? A. That is the total.

Q. That is 1,059, is it?

A. That is what they sold me, but they didn't deliver it.

Q. That was the amount of coffee which you purchased, was it? A. Yes, sir.

Q. And which you paid for?

A. That is what I paid for.

Q. Where did you get these figures from, Mr.

(Testimony of Leon Lewin.)

Lewin, that you have given—that you have read from? A. From the contract with Bickford.

Q. From the contract of Bickford?

A. Yes.

Q. You just got the figures from Bickford's contract and entered them in your book?

A. Yes, sir.

Q. Did you ever yourself determine how much coffee you actually did receive?

A. No. I can only tell by the outgoing weights when I sold it.

Q. That is outgoing from the warehouse?

A. Yes.

Q. You got those from the warehouse book?

A. No, I didn't keep any warehouse book.

Q. From their warehouse?

A. From their warehouse weights.

Q. They furnished you with the weights as you ordered it out?

A. They gave me the weight tags, all the final tags when they weighed it.

Q. What do your books show with reference to the outgoing coffee?

A. You see I had those parcels loaded in cars. I will give you every car, the weight; that is the way I dealed it out.

Q. You dealed it out by weight and bags, too?

A. Yes. 400 bags was in a car, and 320 in a car, 263 in another one, and that in another. Everything in this was "Santa Rita" coffee except 85 bags which were added, which I sold in the same invoice.

(Testimony of Leon Lewin.)

Q. Where did those come from?

A. Those were my own property.

Q. That you had purchased before you purchased the "Santa Rita" coffee? A. Yes, sir.

Q. Then exclude that 85 bags.

A. I sold them 1,659 bags of which 85 belonged to me.

Q. You sold 1,574 bags; is that correct?

A. Yes, sir.

Q. And what is the weight?

A. The total weight. You want the gross or net?

Q. What is the difference between gross and net?

A. There is a difference between that.

Q. We want the gross weight?

A. 234,116 pounds less 11,378.

Q. The 85 bags weighed 11,378?

A. Yes, sir.

Q. That leaves 222,738 pounds. A. Yes.

Q. You handled the Schilling coffee and this Leege & Haskins coffee as one lot, didn't you?

A. Sold it as one lot; one might have been put in to the other in the sacks.

Q. Now, I understand, Mr. Lewin, that the total weight of the coffee as shown by the libels is 152,764, and that you bought and paid for 151,236.

A. I gave this gentleman here all the weights from the bills this morning. When I went through that thing we added those 85 bags which would make up what went out, which we only found out yesterday. So all I got from Leege & Haskins I paid by the in-

(Testimony of Leon Lewin.)

voiced weights. Whatever his invoice originally called for that is what I paid him.

Q. Whatever whose invoice called for?

A. The Canton gave me a weight. He (pointing to Mr. Oliver) got it; he got everything that I had. I was looking for these papers to bring them along this morning and I couldn't find them.

Q. You don't know what weight the Canton or the New Zealand gave you?

A. That is what I was looking for and trying to locate this morning.

Q. Mr. Lewin, how much did you pay the insurance company for the coffee—the insurance companies? A. I could not tell you.

Q. How many pounds did you pay for?

A. They presented me a bill with so many pounds, what the invoice called for.

Q. They presented you a bill for so much per pound, for 152,764 pounds? A. Exactly.

Q. And you paid it?

A. I paid it according to the invoice weight.

Mr. DENMAN.—Q. How did you pay that, Mr. Lewin? A. By check.

Mr. KNIGHT.—Q. Have you your check here?

A. No. That is three years ago.

Q. Where is your check-book?

A. I will have to dig that out.

Q. You keep your check-books, don't you?

A. Yes, sir.

Q. It won't take you more than a few minutes to find out the amount you paid to the insurance company for this coffee, will it?

(Testimony of Leon Lewin.)

A. I will give it to you.

Mr. DENMAN.—Q. You have shown here that of this coffee you received from the steamer "Santa Rita" you sold 222,738 pounds. A. Yes, sir.

Q. That is correct, is it?

A. Yes. I take that for granted.

Q. That is to say 234,116 pounds less the 85 bags amounting to 11,378 pounds? A. Yes.

Q. So that you sold of this coffee 222,738 pounds, and that is all you received or sold, is it not?

A. And the sweepings which I received, which belonged to me, to make up the shortage.

Mr. KNIGHT.—Q. How much sweepings did you receive?

A. I don't know. The man who delivered them ought to know. I don't know the weight.

Q. Whom did you pay for the sweepings?

A. Nobody. The sweepings belonged to whoever bought the coffee. It was agreed that the sweepings belonged to the owner of the coffee, but this gentleman here (referring to Mr. Oliver) said that the sweepings belonged to the ship.

Q. All of the sweepings were 1,528 pounds, were they?

A. That is the way it figured out on paper. Take it for granted that is right.

Q. You cannot tell whether that is right or not?

A. I could not tell. I would not swear. Take that for granted. Whatever you say, gentlemen, that goes.

(Testimony of Leon Lewin.)

Q. Then you are not in a position to state what shortage, if any, there was in that cargo?

A. Nobody can tell that. I can only tell what I bought and what I sold. That is the only way I can arrive at it.

Mr. DENMAN.—You did not sell any more than you bought? A. No, sir.

Q. Then the amount that you sold is the exact amount that you bought from the Leege & Haskins and Schillings? A. Exactly.

Mr. KNIGHT.—Q. You don't know how much sweepings you received? A. No, sir.

Q. Because they didn't go into the warehouse?

A. We had them in the warehouse down there.

Q. You ordered them out of the Southern Pacific warehouse, the sweepings out of the Southern Pacific warehouse on the 15th of July, 1907, to the Gibraltar warehouse, did you? A. Yes.

Q. Then you mixed that with other coffee?

A. Yes.

Q. Amounting to 1100-odd bags of coffee; is that correct? A. Yes.

Q. And then you sold that under the name of "Skidoo"; isn't that right? A. Yes.

Q. It seems to me, Mr. Lewin, you might have given us that information yourself.

A. Didn't you ask me for that information and didn't I give it to you?

Q. I got that memorandum from Mr. Oliver, who got it from the warehouse.

A. I told him to go to the warehouse and get it.

(Testimony of Leon Lewin.)

Q. What would you say those 1100 bags weighed?

A. One hundred and thirty-five pounds a bag.

Q. Didn't you just say that that was ordered out and mixed with the other coffee, that 1100 bags was the total amount of the coffee which was mixed in with the sweepings; isn't that correct?

A. If you will let me explain it, I will. At the Gibraltar warehouse I had a mixture of 1100 bags of coffee, and I had about 14 or 15 or 16 bags of sweepings—I don't remember how many bags it was exactly, but it was the amount they delivered. I take it for granted that the amount was in the neighborhood of 11 which I threw into my coffee, the 1100 bags.

Q. As a matter of fact, these sweepings you put into this very lot? A. Yes.

Q. And it made a large lot of coffee, mixed in with the sweepings, and you sold it under the name of "Skidoo"? A. Yes.

Q. Although you were careful not to sell the other coffee in this market by reason of your fear that it might hurt your business, but you sold some down at the waterfront, didn't you?

Q. Didn't you sell it to the waterfront?

A. No, sir.

Q. You have already testified you sold it at the waterfront.

A. At the same place where the other coffee went to.

Q. Where did it go to? A. To St. Louis.

(Testimony of Leon Lewin.)

Q. Was that all sweepings coffee that went to St. Louis? A. Only 9 bags.

Q. Where did the sweepings go?

A. In the sacks of the 1100 bags.

Q. I will ask you if you did not so testify, that you sold it down at the waterfront?

A. I wanted to get away as quickly as possible.

Q. All I want to get *is* it to explain that shortage.

A. What do you want me to do? If you will tell me what you want I can explain it.

Mr. DENMAN.—Q. Now, Mr. Lewin, you don't contend, do you, that those sweepings made up all the shortage that there was on the "Santa Rita" cargo, do you? A. No, sir.

Q. There was still a shortage after that, was there not?

A. Yes. I take it for granted. I could not tell you what, because I didn't weigh the sweepings.

Q. The ship told you or Mr. Oliver told you that these sweepings belonged to the ship and not to you?

A. At the time when I made the purchase I arranged with the insurance company that if I bought at the invoice weight the sweepings I should get. So I went to Mr. Oliver; at first he would not give me no hearing. Well, I says, these sweepings belong to me; I bought the coffee at the original weight and whatever leaked out belongs to me. Well, he said, that was a question, and at first he didn't give me no hearing, and I dropped the matter, and I didn't want

(Testimony of Leon Lewin.)

to go back any more, and after two months I got the sweepings that was sent to the warehouse.

Q. It might have been three or four months, might it not?

A. Might be four or five months; I don't know.

Q. Were these sweepings as good as the coffee you got in the bags? A. No, sir.

Mr. KNIGHT.—Q. It had dirt in it?

A. They were sweepings from the ship, and they had dirt in.

Q. In pretty poor shape? A. Yes, sir.

Q. Didn't you testify at page 106 of your testimony:

"Mr. DENMAN.—Q. What became of that coffee? A. It was delivered to me.

Mr. KNIGHT.—Q. And after that?

A. After that I know I had 1500 pounds; I had it fanned and cleaned; I remember that at one time there was a sailing vessel that wanted some strong coffee, and I sold it one of those commissioner merchants here; I sold it to them; I sold one man 900 pounds, and so on.

Q. You retailed it?

A. Yes. That went out with the sailors, going north, who wanted strong coffee.

Q. They wanted something that would stay by them? A. Something that will smell.

Mr. DENMAN.—Q. They wanted an oily coffee for an oily voyage?

A. You know they want strong coffee, those fellows that go north."

(Testimony of Leon Lewin.)

Did you testify that way? A. Yes, sir.

Q. Is that correct?

A. At the time that I testified I mixed up this one with the "Santa Rita" coffee. My young man who keeps the books says, "No, Mr. Lewin; what we sold there to the sailing vessel was a different lot entirely." That was some bad coffee that we had here, fermented coffee. He told me that that coffee that I testified about selling to the sailing vessel was an entirely different lot of coffee, and after he said it I remembered it. That was some other bad coffee that I had.

Mr. DENMAN.—Q. So that the coffee you sold to the sailing vessel was not "Santa Rita" coffee at all? A. No, sir.

Q. But the "Santa Rita" coffee which was these sweepings—I mean the "Santa Rita" sweepings coffee was mixed up with the 1100-odd bags of "Skidoo" that you sold last summer?

A. Yes, sir.

Mr. KNIGHT.—Q. How do you know that that sweepings coffee was not sold to ships? How do you know that the testimony you gave was untrue, that that sweepings coffee was not sold to the sailors?

A. I found it out by my man, Mr. Casner, who keeps my books. He drew my attention to that.

Q. He simply told you it was not?

A. My man told me.

Q. The man who is in your employ told you that it was not. That is all you know about it?

(Testimony of Leon Lewin.)

A. I made a mistake.

Q. Why did you testify that way first?

A. I could not keep that in my head. I sold 40,000 bags of coffee, and you cannot keep that in your head for two years.

Q. Who sold that sweepings coffee, yourself or this man?

A. The sweepings coffee went into the mixture and was sold in the same way the whole lot was sold.

Q. Who attended to that?

A. It was done through brokers.

Q. You have not a very clear idea of the whole business, have you?

A. No, I have not. I didn't pay much attention to that thing. I thought the thing was dead long ago.

Mr. DENMAN.—Q. The amount that you paid to the insurance companies would indicate the number of pounds you received at that time, would it not? A. No.

Q. Well, it is the amount you intended to buy?

A. The amount I agreed to buy, but I would have to take my chances what I am going to get.

Q. You bought it at so much a pound for so many pounds? A. Yes.

Q. You check will indicate, according to the amount you agreed to pay for it, how many pounds you received?

A. Yes. I can give you that by telephone. We have got to look up the checks what I give to these

(Testimony of Leon Lewin.)

people. I will telephone to you the checks I gave to each of them.

Mr. KNIGHT.—Q. Here is the way that was: you took the number of bags from the insurance companies' figures? A. Yes, sir.

Q. And you paid them according to their figures?

A. According to their figures.

Q. And if you did not get it—

A. It was my loss.

Q. If you did not get what the insurance companies claimed they sold to you, why, it was your loss. Is that the idea? A. Yes.

Q. What your loss is you don't know?

A. I don't know.

Q. How much the shortage is you don't know?

A. I don't know.

Q. You simply relied on them for the figures?

A. Exactly.

Mr. DENMAN.—Q. You don't know how many pounds you got because you are able to tell that from the amount you sold?

A. Within a hundred pounds I would know.

Q. You know how much coffee you received because you resold all the coffee you received?

A. Yes, sir.

Q. And the amount of coffee you received was the amount you sold? A. Exactly.

Q. Now, the amount that you paid for was the amount you gave a check for to the two companies?

A. Yes, sir.

(Testimony of Leon Lewin.)

Mr. KNIGHT.—Q. You don't know how much of this entered into that Skidoo coffee?

A. No, sir. You can guess that by a few pounds. Supposing you take it for granted and give it every benefit of doubt, it would not amount to more than $10 difference.

Mr. DENMAN.—Q. What is the outside limit of the sweepings, the outside limit of the weight of the sweepings that you received?

A. If you can tell me the amount of the bags I received I can tell you. Say 100 pounds to the bag.

Mr. OLIVER.—He had 11 bags after it was cleaned.

Mr. DENMAN.—Q. What is the average of one of those bags? A. Say 135 pounds.

Q. That is to say, you received 11 bags weighing about 135 pounds apiece?

A. Yes. I don't remember it. I remember I got some coffee, but I don't remember the amount of it.

Q. What do you suppose that coffee was worth after cleaning?

A. I sold it for 4½ or 4¾ cents the whole Skidoo mixed.

Q. Was this better than the average or worse than the average?

A. Worse than the average.

Q. Will you turn to the coffee that you got, the Leege & Haskins coffee in this books of yours, and look at those.

A. This is the date (showing).

(Testimony of Leon Lewin.)

Q. You have got 983 bags?

A. That is what I bought on the invoice.

Q. You have got 983 bags marked U. S., and 53 marked D. V., and 23 bags marked S. S.

A. Yes.

Q. That is all that you received?

A. Now listen, those are the coffees that I sold to St. Louis. That is the reason I say I can't remember. You know sometimes when we make a mixture we give it a name like Skidoo; that is a fictitious marking; that is not the original marking. You see I have not got the weight of the other coffee here and I have not got the weights, because we don't know it.

Q. Now, let me ask you: isn't it true as to these 983 marked U. S. and 53 D. V. and 23 S. S., that those were the bags for which you paid?

A. Yes.

Q. And it was on the weights of those bags that you gave your check? A. Yes.

Q. As shown by the invoices? A. Yes.

Mr. KNIGHT.—Q. How do you know that, Mr. Lewin?

A. I can only give you the check and the bill which I gave you.

Q. Can you say that you did not give a check for 124 St. L.? A. No, I couldn't say that.

Q. Nor any of the others; you don't know what you gave a check for and what you did not?

A. I gave a check to the Canton Insurance Company.

(Testimony of Leon Lewin.)

Q. You gave one check?

A. One check for this and one for that.

Q. Did you give two checks, one to the New Zealand and one to the Canton? A. Yes.

Q. You don't know what those checks are, what the amounts are? A. No.

Mr. DENMAN.—Q. This represents, 983, 53 and 53 represents the condition of the coffee as you bought it. You sold it as one lot?

A. No. We had it put in this manner.

Q. This represents the coffee as resacked, does it not?

A. After resacking. That is the way it was entered here. Those marks are fictitious.

Mr. KNIGHT.—Q. Whose marks are they?

A. My young man's marks.

Q. On this column under the heading "sold" you sold the identical quantity that you received, that is, that which you have marked as having been received. I see that on your sold column, you have sold 391 bags opposite your 391 G. C.; 124 bags opposite your 124 St. L.; 983 bags opposite your 983 U. S.; 53 bags opposite your 53 D. V. and 23 bags opposite your 23 S. S. So that apparently according to your books you have sold the exact amount which your books show you received.

A. No; we didn't get no marks from them. That is all fictitious marking. The whole thing was manufactured, I can see that now.

Mr. DENMAN.—Q. The fact is that the entries in your books, 983 U. S., 53 D. V. and 23 S. S. are

(Testimony of Leon Lewin.)

the marks of the "Santa Rita" Leege & Haskins coffee after it was resacked by you?

A. Yes, manufactured by me, made by me.

Q. Those marks were made by you?

A. Yes.

Q. They were the marks that you put on the bags when you resacked that coffee?

A. Yes, sir.

Mr. KNIGHT.—Q. And your books show that you sold the same amount, identically the same amount that your books show you received?

A. What do you mean?

Q. You charge yourself here with having received this quantity of bags set forth in your book and you credit yourself with having sold the same quantity.

A. I manufactured those things.

Q. I don't care about the marks at all. I am speaking of the quantities. A. Yes.

Q. You did not resack all of the coffee?

A. All of them.

Q. Did you resack all of the coffee, including the coffee in which the sacks were goods? A. Yes.

Q. Why did you resack those coffees?

A. To make an average out of it all.

Q. Make an average of it? A. Yes.

Mr. DENMAN.—Q. Make a blend you mean?

A. Yes.

Mr. KNIGHT.—Q. This was all one lot; it was the Leege & Haskins and Schilling; it all came out of the same boat; it was all to a certain extent similarly impregnated with those odors, was it not?

(Testimony of Leon Lewin.)

A. Yes, sir.

Q. Why did you want to resack it if it was all similarly impregnated with the odor?

A. The Schilling coffee was much better coffee than the Leege & Haskins, and it was advised by the brokers to mix the whole thing together and resack it. The sacks that were good it was put in them again and the sacks that were not we took new ones.

Q. Then when you resacked this coffee, as far as the old sacks were concerned, those that you could use you used? A. Yes.

Q. And you simply bought a certain quantity of new sacks? A. Yes.

Q. So that, according to the expense which you incurred in getting new sacks, you used 647 old bags and you bought 900 new bags. Now, did you buy smaller new bags than the old ones were?

A. No.

Q. So that you must have had the same quantity after resacking in these bags that you had before, hadn't you?

A. I don't know anything about that, because they might not have been able to get the same quantity in the bags again.

Q. Of course, there might have been a little discrepancy. I mean as far as the size of the bags were concerned they were the same as the original bags?

A. No.

Q. Assuming you used 647 old bags; you simply after you had resacked this coffee put the coffee back.

(Testimony of Leon Lewin.)

as far as these 647 old bags would hold it, into those bags, didn't you? A. Yes.

Q. You filled those bags as formerly?

A. Yes.

Q. Then you had about 900 new bags. Isn't that so? Assuming now that these figures which you have given us are correct, you must have had about 900 new bags? A. Yes.

Q. You bought the same size bags as were on the original importation, didn't you? A. No.

Q. You got a smaller bag?

A. No, a larger bag.

Q. So that your 900 new bags were larger than the old bags? A. Yes, sir.

Q. And yet with those larger bags you make up a total amount of coffee received and coffee sold of 1574 bags. Is that correct?

A. I take it for granted it is correct, but I would not swear to it.

Q. So that you must have had as much weight in those 1574 bage as you did in the original quantity that you received before you resacked it?

A. I can't understand the whole thing that you have given. Tell me what you want and I will give it to you. I can't understand you, but if you will help me out I will give you whatever you want.

Mr. DENMAN.—Q. As a matter of fact, Mr. Lewin, the accurate thing here is this gross weight?

A. Yes.

Q. The gross weight that you sold of the "Santa

(Testimony of Leon Lewin.)

Rita" coffee, aside from the sweepings was 234,116 less 11,378?

A. That is right. That is all I can tell you.

Q. So that the amount of coffee that you received was 222,742 pounds? A. Yes, sir.

Q. In addition to that you received subsequently 11 bags of sweepings? A. Yes.

Q. And those 11 bags of sweepings would probably average 135 pounds? A. Yes, sir.

Mr. KNIGHT.—Q. Now, Mr. Lewin, take page 140 of your book. It appears there that you sold gross 234,116 pounds, don't it? A. Yes.

Q. On the 21st of February, 1907, to some St. Louis people? A. Yes, sir.

Q. Then take this same book at page 141, and that shows that you sold gross 85,142 pounds; isn't that right? A. Yes, sir, to somebody else.

Q. To somebody else at St. Louis? A. Yes.

Q. Is the lot at page 140 the Leege & Haskins and Schilling shipment?

A. That is the "Santa Rita" excepting the 85 bags.

Q. Except 11,738 pounds gross? A. Yes.

Q. What was the transaction on page 141?

A. That is not the "Santa Rita."

Q. Can you put your hand on the page showing the invoice of the Skidoo coffee?

A. No. You know the Skidoo coffee will be two bags, for instance. I took 54 bags of the Skidoo from this lot and 25 bags of this lot. Here is one

(Testimony of F. B. Oliver.)

mixed, and here is another mixed. This is the arrival marks. I take some of those and throw them together.

Mr. DENMAN.—Q. This is the incoming coffee?

A. Yes. You can't trace up the Skidoo coffee here.

[Testimony of F. B. Oliver, for the Respondent (Recalled).]

F. B. OLIVER, recalled.

Mr. KNIGHT.—Q. Mr. Oliver, can you state what was the price then and now of sacks for this coffee?

A. They were very high then; they were worth something between 17 and 18 cents apiece.

Q. I notice by Mr. Lewin's statement which has been put in evidence here dated January 28th, 1909, there was $162.14 spent for new sacks for this coffee. That at 18 cents apiece would be equal to about 900 sacks? A. Just about.

Q. That was for the Leege & Haskins and Schilling coffee? A. Yes.

Q. So that if there was a total of 1547 sacks on both those consignments and he got 900 new sacks, it would leave 647 old sacks or bags that were used?

A. The bulk of these bags were very light. In the first place it should never have been shipped from New York in these bags. The ship should never have taken it. It was marked single bags; they were ordinary 12 ounce bags, and all machine sewed.

Q. What is the ordinary bag?

(Testimony of F. B. Oliver.)

A. The ordinary bags weigh about 2½ pounds apiece, and are 28 by 40, and that is what is called a double twill; that is a very heavy bag.

Q. That is the ordinary coffee bag?

A. Yes; it is a very heavy bag. One coffee man told me here in San Francisco that they ought to have lost every pound of it, on account of shipping it in those light bags; a great many of them were broken; their own weight would break them; to put 135 pounds of coffee in one of those bags is all wrong.

Mr. DENMAN.—Q. Mr. Oliver, did you notice this as soon as the bags came out of the ship, that they were of this quality? A. Yes, I did.

Q. Then the man that took them on board would have noticed this as well?

A. He did notice it. On some of the bills of lading that I have there is a notation that they are single covers.

Mr. KNIGHT.—Q. What ones are you referring to, what bills of lading, of what shipment?

A. The Schilling shipment.

Q. Look at the Leege & Haskins.

A. They are both there.

Mr. DENMAN.—Q. As I understand it, the bill of lading shows that they were shipped in good order and condition, and at the time they recognized the fact when they said it was in good order and condition it was single covers?

A. They did. Here is another. That is made out by another man entirely. That has got in red

ink in single bags. To save the ship he should have put in another clause, which he did not.

Q. Which clause?

A. He should have put in there "shipper's risk," which he did not do. That I will admit myself. Now, so far as the sweepings are concerned on the ship, I would like to clear that up. Mr. Lewin came to the Johnson Higgins office, where I was making deliveries of this coffee and receiving the freight, with Mr. Bissell, the outside man for the Hazlitt Warehouse Company, and absolutely demanded of me all the sweepings, and I said, "They do not belong to you." "Why," he said, "Mr. Lewin here has just bought that coffee," and Mr. Lewin spoke up and said, "I want it." I said, "You cannot have it all." I said there were three lots of coffee there and when I got through dealing with this cargo, I would proportion the sweepings and give him what belonged to him. He got all of the sweepings that were coming to him. He said he came there once. He came there again the next day. I am perfectly familiar with those facts. He did get all the sweepings he wanted and he did get all of the proportion that belonged to him. He got his 20 bags, which was his proportion, and Mr. Cambron, who bought the Brandenstein coffee, got 24, as his was in the lower part below all of the other cargo, part of which came out on the Little Mail Dock and the other on the Steuart Street wharf, and his coffee was very much more damaged and the loss was a great deal greater in that coffee than it was in the lot he

(Testimony of F. B. Oliver.)

bought. Now, those are the circumstances connected with that.

(An adjournment was here taken until Friday, March 26th, 1909, at 10:30 A. M.)

Friday, March 26, 1909.

Mr. DENMAN.—I hereby offer in evidence a check dated February 16, 1907, on the London, Paris & American Bank, number 283, payable to the order of the Canton Insurance Office, Limited, for $7,643.26, and signed by Leon Lewin, which check was received and endorsed by the Canton Insurance Company, and was in payment for the damaged coffee bought by Lewin from the Canton Insurance Office, Limited, the insurers of Leege & Haskins. The rate at which the coffee was bought was 5¼¢ a pound at 2% discount.

And I also offer a check signed by Leon Lewin payable to the New Zealand Insurance Company, the insurers of Schilling, in payment for damaged coffee, in the Steamer "Santa Rita," in the amount of $3,885.79, the purchase price being 5¼¢ a pound, 2% discount.

Mr. KNIGHT.—To which we will object on the ground that the matter is incompetent, irrelevant and immaterial as to the amount received by the two insurance companies, respectively, from Lewin. I am not objecting on the ground that the insurance officers are not here to testify that they did receive those checks, respectively, from Mr. Lewin. I am not making that objection.

(Testimony of F. B. Oliver.)

Mr. DENMAN.—In answer to the objection, we state that the testimony regarding the checks was brought out by the examination of the respondent, and was a part of his examination.

Mr. KNIGHT.—I call your attention, Mr. Commissioner, to the fact that I happened to be looking over the record this morning and I find that Mr. Lewin has himself testified respecting the amount that he paid, giving the amount $16,000, and said it is taken from his books, and yet he comes here and tells us that he cannot determine from his books how much he paid for his coffee, and that we will have to rely on the insurance companies to produce the checks to determine what the amount was. Here is the testimony of Mr. Lewin. I happened to run across it this morning: "Q. You paid $16,495.28 for the coffee? A. Yes. Q. You sold it for how much? A. What, the coffee? Q. Yes. A. I don't know. I haven't got that, you know." There is a discrepancy of about $5,000. He claims that he had some memorandum before him, and he gives us those exact figures, $16,495.28.

Mr. DENMAN.—That is what he sold the coffee for.

Mr. KNIGHT.—That is what he paid for it. I want to ask a question or two of Mr. Oliver.

Testimony of F. B. Oliver, Recalled.

Mr. KNIGHT.—Q. Do you know what that Cambron coffee sold for? A. Yes.

Mr. DENMAN.—Q. Do you know of your own knowledge? A. Brandenstein told me.

(Testimony of F. B. Oliver.)

Q. Do you know of your own knowledge?

A. No, sir.

Mr. KNIGHT.—Q. How much was it?

A. It was over 8¢.

Mr. DENMAN.—I object to that testimony.

Mr. KNIGHT.—Q. Over 8¢ per pound?

A. Yes.

Q. What coffee was that, the coffee landed at the Little Mail Dock? A. Yes.

Mr. DENMAN.—Q. Did you see the Cambron coffee when it was sold?

A. Yes, I knew all about it.

Q. Did you see it yourself when it was transferred to the purchaser?

A. No, sir; I didn't see it transferred to the purchaser. I know that coffee brought over 8¢.

Mr. KNIGHT.—Q. Mr. Oliver, there was some coffee of the Brandenstein lot, landed at the Steuart Street Dock also? A. Yes, sir.

Q. And in what shape was the Steuart Street coffee compared with the coffee that was landed on the Little Mail Dock?

A. It was very much worse. That was very badly damaged. It was mouldy and damp, and the sacks were torn.

Q. Now, how did the Brandenstein coffee landed at the Little Mail Dock compare with the coffee for Leege & Haskins?

A. It was very much poorer. That brought very much less.

(Testimony of F. B. Oliver.)

Mr. KNIGHT.—We have admitted as to the weight of this Leege & Haskins' shipment, as being in accordance with the amount set forth in the libel, have we not? That is my recollection.

Mr. DENMAN.—Yes, that is at page 72.

The WITNESS.—I cannot understand why there is such a discrepancy in those coffees. I never heard of such a thing. I have been in the coffee business myself for a great many years, and I never heard of such a discrepancy. The Brandenstein coffee would all average 135 pounds.

Mr. KNIGHT.—Q. What did the Schilling coffee average? A. One hundred and fifty-four.

Q. What does the Leege & Haskins average?

A. One hundred and forty-three. I know that coffee will vary 5% in my experience one way or the other.

Q. Now, to make the computation exact, there was an arrangement whereby, I believe, the libelant was to pay the additional freight on the additional amount of coffee which it was admitted had been received?

A. We took this as evidence. That was the weight.

Mr. KNIGHT.—That total amount of freight according to statement?

Mr. DENMAN.—Fifty-six dollars and twenty-two cents.

Mr. KNIGHT.—Fifty-six dollars and fifty-seven cents, I have it. That is according to page 83.

(Testimony of F. B. Oliver.)

Mr. DENMAN.—That is adding the tolls, but the State tolls were not added.

Q. Now, Mr. Oliver, I find here a complaint that you did not believe you were fairly treated because you had no opportunity to examine the coffee on the Little Mail Dock. A. Yes.

Q. Now, is that really fair, didn't you have a chance to examine it?

A. I did not. I did have a chance to examine it, but I have no right to go and examine other people's coffee.

Q. You did not examine it then?

A. They came and paid their freight and took their delivery order and that coffee belonged to them. I have no right to go down and examine any person's coffee. I did look at the coffee as it came out of the shed. I took up a handful here and there as it came out, as it was strewn along the wharf from the poor bags where they were torn, but to take samples of the coffee I did not. I calculated that the owners of the coffee would make a claim and thereby we could determine the weights, but I don't know what the weights are.

Mr. DENMAN.—In view of this additional testimony regarding the Cambron coffee, which is entirely new to me, this matter will have to be continued.

Q. You say you don't know what the Cambron coffee was sold for of your own knowledge?

A. Except what he told me. He told me he got over 8c for the Brandenstein coffee from the Little Mail Dock. That I know was not damaged, that is

(Testimony of F. B. Oliver.)

to say, by moisture, or anything of that kind, that was damaged by the odor of the oil, the fumes.

Q. He paid what for that?

A. Six and a quarter or six and a half. I have forgotten. It is in the book there.

Q. And you negotiated that sale?

A. Yes, sir.

Mr. KNIGHT.—Q. Did that include the Stewart Street coffee?

A. Yes, the whole of it brought either 6¼ or 6½. I have forgotten; it is there in the book. Of course, less 2%. That is the custom of the trade, 2% in 90 days.

Mr. DENMAN.—Q. Purchased it for 6c less 2% discount? A. Yes.

Q. What was that coffee that you sold for 6c less 2% discount? A. The Brandenstein coffee.

Q. I thought you told us the other coffee was sold at 2%?

A. The Brandenstein coffee. I had nothing to do with the Leege & Haskins.

Q. That was sold in about ten months?

A. No, that was sold in August or September.

Q. That would be?

A. February, March, April, May, June, July, August, September—eight months.

Q. What were the warehouse charges for keeping it?

A. I don't know anything about it. I had nothing to do with that.

(Testimony of F. B. Oliver.)

Q. The warehouse charges amount to considerable?

A. That, I say, I had nothing to do with. I settled with Brandenstein.

Q. They had to pay the warehouse charges?

A. I presume they did.

Q. There was interest on the coffee as it lay idle?

A. Yes.

Q. And fire insurance on it during all that period?

A. I presume so, I couldn't tell you. I had nothing to do with that.

Q. Of course, there is a gambling chance as to whether the coffee would improve rapidly or not rapidly? A. No gambling chance at all.

Q. The rapidity with which it gives off certain oils will vary? A. Yes.

Q. There would be a gambling chance in February as to what the stuff would be worth in September, you wouldn't know whether it would gain or lose?

A. I should say that I know it would lose.

Q. There would be a gamble between February and September as to whether the coffee would gain or lose?

A. Not any more than there would be in any goods stored in a warehouse. You don't know what they are coming in contact with.

Q. With respect to the 5¼c in February and the 6c in September you would have to take into consideration all of those matters?

(Testimony of F. B. Oliver.)

A. Yes, and a poor market, too. There was a very poor market in August.

Q. Are you now referring to the market for good coffees or the market for Skiddoo.

A. Good coffees.

Q. How about the market for Skiddoo between those two periods—rotten coffees?

A. There were no rotten coffees. Rotten coffees are not used. These were not rotten coffees. There is not anything in that.

Mr. DENMAN.—If it is conceded that the testimony as to the sale of the Cambron coffee is pure hearsay, and not relevant to the case, why, we will go on this morning. If it is to be regarded for what it is worth, we will request a continuance.

Mr. KNIGHT.—Mr. Oliver says he got his figures from Cambron.

Mr. DENMAN.—If it is to be considered as admitted as testimony, I desire to produce counter-testimony.

Mr. KNIGHT.—We will treat it as pure hearsay, then, because we want to conclude this matter some time.

(Counsel thereupon proceeded with their arguments.)

[Endorsed]: Presented and filed in open court, June 3, 1909. Jas. B. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Libelants' Exceptions to the Findings and the Report of the United States Commissioner.]

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,
Libelants,

vs.

The American Steamer "SANTA RITA," etc., and All Persons Claiming any Interest Therein,
Respondents.

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States, in and for the Northern District of California:

Now comes the *libelant* and excepts to the findings and report of the Commissioner herein as follows:

I.

Excepts to the finding that the 152,764 pounds of coffee described in the libel and injured on the said voyage was valued at 10½ cents in sound condition at the port of San Francisco, on January 30, 1907, the time of arrival.

II.

Excepts to the Report in that it fails to find that the sound value of the said 152,764 pounds of coffee at the said time and place was eleven cents per pound.

III.

Wherefore, the libelant prays that the Court will find the said value to be eleven cents per pound, and that $763.82 be added to the damages found in said report, together with interest thereon from January 30, 1907.

WILLIAM DENMAN,
Proctor for Libelants.

[Endorsed]: Filed Jun. 3, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Claimant's Exceptions to the United States Commissioner's Report.]

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,
Libelants,

vs.

The American Steamer "SANTA RITA," etc., Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,
Respondents.

EXCEPTIONS TO COMMISSIONER'S REPORT.

Claimant herein *hereby to* the report of the Commissioner heretofore made and filed herein, for the following causes, that is to say:

1. Because the said Commissioner finds that the value of the coffee in question, upon its arrival at the port of San Francisco, was only five and one-quarter (5¼) cents a pound and that said coffee was not worth at least six (6) cents a pound, reducing the amount of damages found by the Commissioner herein, by eleven hundred and forty-five and 73/100 (1145.73).

2. Because said Commissioner has allowed libelant interest from the 30th day of January, 1907, to the date of filing said report, to wit, May 28, 1909, at the rate of six (6) per cent per annum, on a sum equivalent to the difference between ten and one-half (10½) cents a pound, as the sound value of the coffee, and five and one-quarter (5¼) cents a pound, which is found by said Commissioner to have been its value upon its arrival at said port of San Francisco, on one hundred and fifty-two thousand seven hundred and sixty-four (152,764) pounds, instead of allowing interest on a sum equivalent to the difference between said ten and one-half (10½) cents a pound and a sum not less than six (6) cents a pound, upon a like quantity, thereby further reducing the amount of damages herein by the sum of one hundred and fifty-four and 67/100 (154.67) dollars at least.

Dated June 12, 1909.

PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant.

Service of the within exceptions to Commissioner's Report and receipt of a copy is hereby admitted this 12th day of June, 1909.

WILLIAM DENMAN,
Per WM. B. ACTON,
Proctor for Libelants.

[Endorsed]: Filed Jun. 12, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Order Confirming the Report of the United States Commissioner and Overruling the Exceptions Taken Thereto.]

In the District Court of the United States, for the Northern District of California.

THOMAS H. HASKINS et al.

vs.

Steamship "SANTA RITA," etc.

DE HAVEN, District Judge.—The report of the United States Commissioner, filed herein June 3, 1909, is confirmed, and the exceptions, both of the libelant and the claimant, are overruled.

[Endorsed]: Filed Aug. 6, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners, Doing Business Under the Firm Name of LEEGE & HASKINS,

Libelants,

vs.

American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,

Respondents.

Final Decree.

Issue having been joined herein and this cause coming on duly to be heard, the libelants being represented by their proctor, William Denman, Esq., and the claimant United Steamship Company, by its proctors, Charles Page, Esq., and Samuel Knight, Esq., and it being admitted at the hearing that the allegations of the libel as to the ownership of the cargo, its receipt by the vessel in good condition and its delivery in a somewhat damaged condition were true; and it being agreed that the question of the amount of the said damage, in the event that the steamer "Santa Rita," be held liable for the damage, should be referred to a commissioner; and evidence being introduced as to the liability of the vessel for the said damage; and the court finding that the said damage was not caused by leakage, breakage, contact

with other goods and perils of the sea, or any of them, as alleged in the answer or at all;

And the said matter being thereafter referred herein to Commissioner Francis Krull, to determine, ascertain and report the amount of said damages, and the said Francis Krull having ascertained and reported said damages as amounting to Nine Thousand and Seventy-five and 78/100 Dollars ($9,075.78) as of the date of the said report, to wit, the 28th day of May, 1909; and exceptions to the said report having been heard and overruled and the said report by this Court ordered confirmed;

Now, therefore, it is ordered, adjudged and decreed, that the said libelants, Thomas H. Haskins and Max Schwabacher, partners doing business under the firm name of Leege & Haskins, do have and recover for the causes in the said libel mentioned, the sum of Nine Thousand and Seventy-five and 78/100 Dollars ($9,075.78), the amount reported to be due them by said commissioner, together with interest thereon at the rate of seven per cent per annum from the said 28th day of May, 1909, the said date of the commissioner's report, in the sum of $139.20 amounting in all to the sum of $9,214.20, together with their costs to be taxed.

And it is further ordered, adjudged and decreed, that unless an appeal be taken from this decree within ten days after notice of this decree to Messrs. Page, McCutchen & Knight, proctors for the claimant herein and a supersedeas bond staying execution be filed as required by law, the United Steamship Company and the United States Fidelity and Guaranty

Company, the stipulator for the value on the part of the claimant of the said Steamship "Santa Rita," cause the engagements of the said stipulation to be performed or show cause within four days after the expiration of said time to appeal, or on the first day of jurisdiction thereafter why execution should not issue against their goods, chattels and lands for the amount of this decree, with interest at said rate thereon according to their said stipulation.

Dated August 16th, 1909.

JOHN J. DE HAVEN,
Judge.

Entered in Vol. 4 Judg. and Decrees at page 309.

[Endorsed]: Filed Aug. 16, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,
Libelants,

vs.

American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,
Respondents,

UNITED STEAMSHIP COMPANY, a Corporation,
Claimant.

Notice of Appeal.

To Libelants Above Named, and to William Denman, Esq., Their Proctor:

You and each of you will please take notice that the above-named claimant herein, United Steamship Company, hereby appeals, to the next United States Circuit Court of Appeals for the Ninth Circuit, to be holden in and for said Circuit at the City and County of San Francisco, from so much of the Final Decree, made and entered herein on the 16th day of August, 1909, as adjudges and Decrees that said libelants, do have and recover from the claimant the full amount of Nine Thousand and Seventy-five and 78/100 (9,075.78) Dollars, or any sum in excess of the sum of Seven Thousand Nine Hundred and Thirty and 5/100 (7,930.05) Dollars, together with interest thereon and costs as provided in said decree. And in and by said Appeal the above-named claimant hereby gives notice that it desires only to review the question involved in said cause as to the value, at the time of its delivery to the above-named libelants, of the coffee claimed herein to have been damaged.

Dated, San Francisco, California, September 25, 1909.

Yours etc.,
PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant and Appellant.

Receipt of a copy of the within Notice of Appeal is hereby admitted this 27th day of September, 1909.

WILLIAM DENMAN,
By WM. B. ACTON,
Proctor for Libelant.

[Endorsed]: Filed, Sep. 28, 1909. Jas. P. Brown, Clerk. By M. Thomas Scott, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,
Libelants,

vs.

American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein,
Respondents,

UNITED STEAMSHIP COMPANY, a Corporation,
Claimant.

Citation [Copy].

United States of America,—ss.

The President of the United States to Thomas H. Haskins, and Max Schwabacher, Partners Doing Business Under the Firm Name of Leege & Haskins, Libelants, Against the said Steamship "Santa Rita," Her Tackle, Apparel and Furniture, and Against All Persons Intervening for Their Interests Therein:

Whereas, the above-named claimant has lately appealed to the United States Circuit Court of Appeals, for the Ninth Circuit, from a portion of the Decree recently rendered by the District Court of the United States for the Northern District of California, awarding said Thomas H. Haskins, and Max Schwabacher, partners doing business under the firm name of Leege & Haskins, the sum of Nine Thousand and Seventy-five and 78/100 (9,075.78) Dollars, together with interest and costs, and from so much of said Decree as awards said Libelants, any sum in excess of Seven Thousand Nine Hundred and Thirty and 5/100 (7,930.05) Dollars, together with interest and costs:

Now, therefore, you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the City and County of San Francisco, State of California, on the 31st day of October, 1909, to show cause, if any there be, why said Decree rendered against said appellant should not be corrected, and

to do and receive may appertain to justice to be done in the premises.

Witness, the Honorable E. S. FARRINGTON, sitting for the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States for the Northern District of California, this 1st day of October, 1909.

E. S. FARRINGTON,
District Judge.

Receipt of a copy of the within Citation is hereby admitted this 1st day of October, 1909.

WILLIAM DENMAN,
By WM. B. ACTON,
Proctor for Libelant.

[Endorsed]: Filed Oct. 1, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

IN ADMIRALTY—No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,
Libelants,

vs.

The American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture and All Persons Intervening for Their Interests Therein,
Respondents.

Assignment of Errors.

Claimant herein hereby assigns errors in the proceedings of the District Court in the above case, as follows:

1. The District Court erred in confirming the Report of the Commissioner to whom said cause was referred to ascertain and report the amount of damages sustained by the merchandise involved herein, to wit, coffee, and in thereby holding and deciding that the value of said coffee upon its arrival at the port of San Francisco was only 5¼ cents a pound, and that said coffee was not worth, at said time and place, at least 6 cents a pound, which difference amounts at least to $1,145.73.

2. The District Court erred in confirming the said Report of said Commissioner and in thereby holding and deciding that libelants were entitled to receive interest on the difference between 10½ cents a pound, as the sound value of said coffee, at the time of its arrival at said port of San Francisco, and 5¼ cents a pound, which is found by said commissioner as aforesaid to have been its value at said time and place, on 152,724 pounds, instead of allowing interest on the difference between said 10½ cents a pound and a sum not less than 6 cents a pound, upon a like quantity of coffee, which difference in interests amounts to at least $154.67.

3. The District Court erred in not overruling said report of said commissioner to the extent of $1,300.40, at least, and in not reducing the amount

of damages so found by him, by the said sum of $1,300.40, at least.

Dated San Francisco, California, January 27, 1910.

PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant.

Service of the within Assignment of Errors, and receipt of a copy is hereby admitted this 27th day of January, 1910.

WILLIAM DENMAN,
Proctor for Libelant.

[Endorsed]: Filed Jan. 27, 1910. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

[Stipulation for Transmission of Original Exhibits to United States Circuit Court of Appeals.]

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,
Libelants,

vs.

The American Steamer "SANTA RITA" Her Tackle, Apparel and Furniture and All Persons Intervening for Their Interests Therein,
Respondents,

UNITED STEAMSHIP COMPANY (a Corporation),
Claimant.

It is hereby stipulated and agreed by and between the respective parties hereto that all the original exhibits in the above-entitled cause, used upon the reference before the United States Commissioner on the question of damages, may be transmitted by the clerk of the United States District Court to the clerk of the United States Circuit Court of Appeals with the apostles on appeal in said cause.

Dated February 4, 1910.

WILLIAM DENMAN,
Proctor for Libellant.

PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant.

[Endorsed]: Filed Feb. 4, 1910. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,
Libelants,

vs.

The American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture and All Persons Intervening for Their Interests Therein,
Respondents,

UNITED STEAMSHIP COMPANY (a Corporation),
Claimant.

Stipulation and Order Extending Time to File Apostles on Appeal [to November 27, 1909].

It is hereby stipulated and agreed, by and between the respective parties hereto, that United Steamship Company, claimant and appellant herein, may have and it is hereby granted to and including the 27th day of November, 1909, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the Apostles on Appeal, in the above-entitled cause, certified by the Clerk of the United States District Court, Northern District of California.

Dated October 27, 1909.

WILLIAM DENMAN,
Proctor for Libelant and Appellee.
PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant and Appellant.

So ordered.

JOHN J. DE HAVEN,
Judge.

Oct. 27, 1909.

The foregoing stipulation having been entered into, and good cause appearing therefor, it is hereby ordered that the United Steamship Company, claimant and appellant herein, may have and it is hereby granted to and including the 27th day of November, 1909, within which to procure to be filed, in the United States Circuit Court of Appeals for the Ninth Circuit, the Apostles on Appeal, in the above-entitled cause.

Certified by the clerk of the United States District Court, for the Northern District of California.

Dated October 27th, 1909.

_____,

Judge.

[Endorsed]: Filed Oct. 27, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,

Libelants,

vs.

The American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture and All Persons Intervening for Their Interests Therein,

Respondents,

UNITED STEAMSHIP COMPANY (a Corporation),

Claimant.

Order Extending Time to File Apostles to [December 27, 1909].

Good cause appearing therefor, it is hereby ordered that United Steamship Company, a corporation, owner of the American steamship "Santa Rita,"

claimant and appellant herein may have and it is hereby granted thirty (30) days from and after November 27th, 1909, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the Apostles on Appeal certified by the clerk of the United States District Court, for the Northern District of California (including Assignment of Errors), in the above-entitled cause.

Dated November 26th, 1909.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Nov. 26, 1909. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,
Libelants,

vs.

The American Steamer "SANTA RITA," Her Tackle, Apparel and Furniture and All Persons Intervening for Their Interests Therein,
Respondents,

UNITED STEAMSHIP COMPANY (a Corporation),
Claimant.

Order Extending Time to File Apostles [to January 26, 1910].

Good cause appearing therefor, it is hereby ordered that United Steamship Company, a corporation, owner of the American steamship "Santa Rita," claimant and appellant herein, may have and it is hereby granted thirty (30) days, from and after December 27th, 1909, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the Apostles on Appeal certified by the clerk of the United States District Court, for the Northern District of California (including Assignments of Error), in the above-entitled cause.

Dated December 24th, 1909.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Dec. 24, 1909. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 13,639.

THOMAS H. HASKINS and MAX SCHWABACHER, Partners Doing Business Under the Firm Name of LEEGE & HASKINS,
Libellants,

vs.

The American Steamship "SANTA RITA," Her Tackle, Apparel and Furniture and All Persons Intervening for Their Interests Therein,
Respondent,

UNITED STEAMSHIP COMPANY (a Corporation),
Claimant.

Stipulation and Order Extending Time to File Apostles [to February 5, 1910].

It is hereby stipulated and agreed by and between the respective parties hereto that United Steamship Company, a corporation, owner of the American steamship "Santa Rita," claimant and appellant herein, may have, and it is hereby granted, to and including the 5th day of February, 1910, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit the apostles (including the assignments of error), in the above-entitled cause, certified by the clerk of the

United States District Court for the District of California.

Dated January 26th, 1910.

WILLIAM DENMAN,
Proctor for Libellant and Appellees.
PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant and Appellant.

The foregoing stipulation having been entered into, and good cause appearing therefor, it is hereby ordered that United Steamship Company, a corporation, owner of the American steamship "Santa Rita," claimant and appellant herein, may have, and it is hereby granted, to and including the 5th day of February, 1910, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit the apostles on appeal (including assignments of error), in the above-entitled cause, certified by the clerk of the United States District Court, for the Northern District of California.

Dated January 27th, 1910.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Jan. 27, 1910. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

Certificate of Clerk United States District Court to Apostles.

United States of America,
Northern District of California,—ss.

I, Jas. P. Brown, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify that the foregoing and hereunto annexed one hundred and ninety-one pages, numbered from 1 to ——, inclusive, with the accompanying Exhibits, four in number, contain a full and true transcript of the records in the said District Court, made up pursuant to instructions, "Stipulation as to what Apostles shall contain" (embodied in the transcript), of Messrs. Page, McCutchen and Knight, proctors for claimant and appellant, in the case entitled Thomas H. Haskins and Max Schwabacher, etc., vs. The American steamer "Santa Rita," etc., No. 13,639.

I further certify that the cost of preparing and certifying to the foregoing Transcript of Appeal is the sum of One Hundred Dollars and Twenty Cents, and that the same has been paid to me by proctors for claimant and appellants.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 5th day of February, A. D. 1910, and of the Independence of the United States the one hundred and thirty-fourth.

[Seal] JAS. P. BROWN,
Clerk.

[Endorsed]: No. 1821. United States Circuit Court of Appeals for the Ninth Circuit. The United Steamship Company (a Corporation), Claimant of the American Steamer "Santa Rita," Her Tackle, Apparel and Furniture, and All Persons Intervening for Their Interests Therein, Appellants, vs. Thomas H. Haskins and Max Schwabacher, Partners Doing Business Under the Firm Name of Leege & Haskins, Libelants, Appellees. Apostles. Upon Appeal from the United States District Court for the Northern District of California.

Filed February 5, 1910.

F. D. MONCKTON,
Clerk.

Certificate of Clerk United States District Court to Exhibits.

United States of America,
Northern District of California,—ss.

I, Jas. P. Brown, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify, that the accompanying exhibits (transmitted under separate covers), Libelant's Exhibit No. 1 (small bag of coffee), and Libelant's Exhibit No. 2 (small jar of coffee); and the exhibits attached hereto, Libelant's Exhibit No. 3 (Memorandum, marked Lewin), and Claimant's Exhibit No. 1 (Schilling's letter to the owners of the steamship "Santa Rita"), are the original exhibits, introduced and filed by United States Commissioner Francis Krull, at the hearings

before him, in the case of Thomas H. Haskins, and Max Schwabacher, etc., vs. The American Steamer "Santa Rita," Her Tackle, Apparel, etc., No. 13,639, and are herewith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as per stipulation, filed in this court and embodied in the transcript of Appeal, herewith.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 5th day of February, A. D. 1910.

[Seal] JAS. P. BROWN,

Clerk.

[Libelants' Exhibit No. 3.]

Lewin 9½
151236lb c 5¼ less 2./
1528 " short

152,764
Frt 558, 29 16495.28
Ex 70.00
pluss [?] 10%

[Endorsed]: No. 13,639. Haskins et al. vs. "Santa Rita." Lib. Ex. No. 3. Francis Krull, United States Commissioner, North'n Dist. of California.

No. 1821. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelant's Exhibit No. 3. Received Feb. 5, 1910. F. D. Monckton, Clerk.

[Claimant's Exhibit No. 1.]

[Letterhead of A. Schilling & Company.]

13 February, 1907.

Recd 2/14/07

Steamship "Santa Rita"
Union Oil Co,, owners
16th & Illinois Sts.
S. F.

Gentlemen

The S S "Santa Rita" brought for our account 500 bags of coffee which were delivered in unmerchantable condition.

As the damage has occurred while the goods were in your possession, and evidently through your fault or neglect, we beg to advise that you will be held liable for the damage sustained.

Your truly,
A. SCHILLING & COMPANY,
GEO. A. VOLKMAN,
Vice-President.

[Address on Envelope of A. Schilling & Company.]

Union Oil Co.
33021 16th & Illinois Sts
S F

Special Delivery

[Endorsed]: No. 13,639. Dec. 30, 1908. Clmt's Ex. No. 1. Francis Krull, U. S. Commr.

No. 1821. U. S. Circuit Court of Appeals for the Ninth Circuit. Claimant's Exhibit No. 1. Received Feb. 5, 1910. F. D. Monckton, Clerk.

No. 1821

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STEAMSHIP COMPANY (a corporation), claimant of the American steamer "Santa Rita", her tackle, apparel and furniture, and all persons intervening for their interests therein,
Appellants,

vs.

THOMAS HASKINS and MAX SCHWABACHER, partners doing business under the firm name of Leege & Haskins, Libelants,
Appellees.

BRIEF FOR APPELLANTS.

CHARLES PAGE,
EDWARD J. McCUTCHEN,
SAMUEL KNIGHT,
Proctors for Appellants.

Filed this.....day of March, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

No. 1821

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STEAMSHIP COMPANY (a corporation), claimant of the American steamer "Santa Rita", her tackle, apparel and furniture, and all persons intervening for their interests therein,

Appellants,

vs.

THOMAS HASKINS and MAX SCHWABACHER, partners doing business under the firm name of Leege & Haskins, Libelants,

Appellees.

BRIEF FOR APPELLANTS.

In this appeal, the United Steamship Company, claimant of the S. S. "Santa Rita", seeks only to review the question of the value, in its damaged condition, of certain coffees consigned to libelants, or appellees here, and discharged by the steamer at San Francisco. The commissioner to whom the question was referred by the court below, found that this value was 5¼ cents, while appellant contends that it was at least 6 cents a pound,

making a difference, on 152,764 pounds involved in this particular shipment (Leege & Haskins Apostles, pp. 110-113 et seq.), or 151,236 pounds, allowing for a shortage of 1,528 pounds claimed by appellees, of at least $1,145.73, or $1,1134.25 respectively, together with interest thereon from January 30, 1907, as found in the commissioner's report herein (Leege & Haskins Apostles, p. 27).

In the case of this appellant against A. Schilling & Company, pending in this court, precisely the same facts and question are involved, except that the shipment there in question consisted of 77,204 pounds, and the amount in issue $579.03, together with interest from the date last given (Schilling Apostles, p. 24), as the coffees consigned to both of these parties were handled together by the same people, and these cases were virtually tried before the commissioner and submitted together for decision.

THE FACTS REGARDING THE SALES OF THESE COFFEES.

The merchandise, in a damaged condition, was discharged by the steamer at San Francisco, January 30 and 31, 1907. Delivery thereof was taken, and freight paid, by the respective consignees, February 5 following, and the coffees were sold by O'Brien, a broker, at the instance of the insurance companies which had paid loss on these consignments, to another broker or jobber named Lewin, at San Francisco, the following day for 5¼ cents a pound (Apostles Leege & Haskins case, pp. 31, 49, 101-102, 108, 134).

Within two weeks from the time of their arrival, the same coffees were again sold by O'Brien, acting this

time as Lewin's broker, and shipped out of this state to certain eastern parties, on samples previously sent them, for 6¾ cents a pound, i. e., at a profit of about 1 cent a pound, or approximately $1500 on the Leege & Haskins consignment, and over $750 on the Schilling consignment, deducting all expenses and brokerage (Leege & Haskins Apostles, pp. 47, 48, 50, 51, 118, 136, 153; Schilling Apostles, pp. 65-66).

These coffees were hurriedly shipped out of the state before their resale (Leege & Haskins Apostles, p. 140).

The broker O'Brien incorrectly testified that Lewin only obtained on this resale 1 cent advance, on which he had made a profit of about half a cent (Leege & Haskins Apostles, pp. 51-52); whereas, as the evidence afterwards disclosed, and as Lewin subsequently admitted, the advance price was 1½ cents, thereby making, even on O'Brien's own testimony, at least 1 cent a pound profit (Leege & Haskins Apostles, pp. 141-148). The latter admitted that the deal was a pure speculation (Leege & Haskins Apostles, pp. 56-57).

Appellant had no knowledge whatsoever of these transactions until after they had been consummated (Leege & Haskins Apostles, pp. 102-103, 104, 105, 191). No claim had hitherto been preferred against it for the damage respectively sustained by libelants; no notice had been given to it that the coffees would be sold for whom it might concern; no public sale was made or sale on public notice; no opportunity was offered appellant to secure a bidder for the coffees, and thereby minimize the damage by obtaining the best price that they would bring;

and the first intimation it had of a claim of damage to these coffees was by a letter received from Schilling & Co., the consignee of some of the coffee in question, February 14, 1907 (Leege & Haskins Apostles, pp. 102-103), after all of the coffees had been sold and shipped out of the state.

On the same steamer, coffee damaged, *en route,* fully as much as, if not worse than, the coffees involved herein (Leege & Haskins Apostles, pp. 68, 107, 127-128, 189), and inferior in grade to the Schilling consignment (Schilling Apostles, pp. 79, 91-92), and of the same grade and in great part of the same kind as the Leege & Haskins coffees, had been transported to San Francisco consigned to Brandenstein & Company. Appellant was notified of the latter's claim for such damage, whereupon, in the month of August or September of the same year, on a somewhat weaker or more inactive market (Leege & Haskins Apostles, pp. 65-66, 67, 194), appellant effected a sale of the Brandenstein coffee in San Francisco for 6 cents a pound to coffee broker named Cambron, who succeeded to the well established business of the pioneer coffee broker of San Francisco (Leege & Haskins Apostles, p. 110), and who had known nothing of the sale of the other coffees, and had been given no opportunity of purchasing or making a bid for them (Leege & Haskins Apostles, pp. 64-65, 67-68, 73, 80, 84, 192). Cambron testified that he thought the coffee was worth more than that figure (Leege & Haskins Apostles, p. 67). His efforts to buy this coffee went back as far as June of that year (Leege & Haskins Apostles, p. 77).

This witness is the only one who testified respecting the extent to which the Santos coffee, forming the entire Leege & Haskins consignment and a good portion of the Brandenstein consignment, had been damaged, stating that the extent of such damage was twenty per cent; and, estimating its sound value at about 10 cents, he was of opinion that it had been damaged in value about 2 cents (Leege & Haskins Apostles, pp. 64, 66-67), which corroborates the price of 8 cents at which, it seems, he afterwards made a sale of this Brandenstein coffee, as we know by hearsay (Leege & Haskins Apostles, pp. 188-189). Appellant, however, only asks to be allowed the price at which Cambron purchased the coffee from Brandenstein, not the price for which he immediately thereafter sold it.

In his signed statement of January 28, 1909, offered as an exhibit, Lewin estimates his total expense connected with his two sales at $589.14, exclusive of brokerage which a sale to Cambron would have avoided and inclusive of $162.14 for new sacks and inclusive of expenses of drayage, etc., or approximately ¼ cent per pound.

Levinger, of Brandenstein & Company, one of appellees' witnesses, estimated that the cost of carrying coffee, including interest on money invested, "clearing" it, warehouse charges, insurance and loss in weight, "to be safe on the business",—yes, very safe,—was the high figure of one per cent per month, i. e., six per cent for the six months that the Brandenstein consignment was warehoused, after it was discharged from

the steamer (Schilling Apostles, p. 75). This means that it would have cost a little less than $500 on the Leege & Haskins coffee, and about half that amount on the Schilling coffee, according to this witness' figures; but he testified regarding these charges, when under examination by appellees' proctor, as follows:

"Q. About the time you sold that coffee you had incurred charges for warehousing, had you not?

"A. Yes.

"Q. Also for turning over the coffee; there had been some repacking, had there not?

"A. I do not think there was to M. J. Brandenstein & Company, if my memory serves me right. I think they put it in the warehouse, but it had to be put in sacks in order to get it to the warehouse.

"Q. Do you recollect as to that?

"A. No, I do not think we had any charges.

"Q. But charges had to be incurred, did they not, before the coffee could be sold?

"A. Yes, sir.

"Mr. KNIGHT. Q. Incurred by whom? Incurred I suppose by the man who purchased it?

"A. There was a charge. There was storage charges and insurance and so on going against the coffee.

"Mr. DENMAN. Q. Did you pay the insurance charges?

"A. I think our insurance man did for his own protection.

"Q. The warehouse charges you paid, did you not?

"A. I am not sure whether we paid it or how it was. I think that was settled at the final settlement.

"Q. There was also interest accruing during that operation?

"A. Yes, sir" (Schilling Apostles, pp. 73-74).

It does not appear that Brandenstein & Company paid any of the charges for carrying this coffee from the time it was discharged up to the time it was sold to Cambron. The latter testified that he did not pay the storage.

Lewin admits that he did not try to sell either the Leege & Haskins or the Schilling coffees in San Francisco (Leege & Haskins Apostles, pp. 153-155), nor did appellee Schilling & Company attempt to make a sale here of the coffee consigned to it (Schilling Apostles, p. 55), thereby directly contradicting appellees' premier witness O'Brien that these coffees had been offered to the big coffee houses here. Although Lewin was called by appellant, he was in the nature of an adverse witness whose interests were really with the appellees, since it was through the latter, or, the insurance companies which had taken the coffee off their hands, that Lewin had been given the opportunity of indulging in the speculation complained of at the expense of the ship.

In this respect, the record reads regarding his resale of these coffees:

> "Q. As soon as this man in St. Louis got the sample he wired you an offer of 6¾ cents?
>
> "A. He wired an offer of 6¾ cents and he got it.
>
> "Q. You wired an acceptance?
>
> "A. Yes, sir.
>
> "Q. So then the fellow who was not doing business by wire did not have a change (chance) to get that coffee?
>
> "A. Nobody does business by letter in the coffee trade. There is no one man that I send a sample to that I don't get a wire in five days—if I don't get a wire in five days then he don't get them any more.

"Q. Mr. Lewin, how do you know that you could not dispose of that coffee in San Francisco?

"A. In San Francisco?

"Q. Yes. Did you try to dispose of it?

"A. No; I will tell you the reason why: Mr. Folger, Mr. Schilling, Mr. Brandenstein and Mr. Hills and all those big reputable houses, they would not buy such coffee; they would never buy that damaged coffee.

"Q. Did you go around and ask them?

"A. Oh, I know; the same as you would not go around and buy a damaged thing.

"Q. So you assume because the coffee was damaged they would not handle it?

"A. I know they wouldn't handle that damaged coffee.

"Q. Therefore you assumed it was useless to go to them?

"A. Yes, entirely useless.

"Q. Did you ask Mr. Cambron if he would like to get the coffee?

"A. I had nothing to do with Mr. Cambron; he was a broker just like Mr. O'Brien; Mr. Cambron is a broker, and he has sold coffee for me. If I have got any coffee, and Mr. O'Brien takes the samples and goes around and shows it to the people, that is out of his hands.

"Q. Still why didn't you exhaust the coffee buyers here in San Francisco, that is the people that you thought might have handled the coffee before you sent the samples on to these eastern cities?

"A. It would have been a detriment to me—a big detriment.

"Q. A detriment to hawk the coffee about?

"A. It would have been a detriment to me to sell such coffee; they would be saying, 'Lewin is selling unsound coffee'. That is all my competitors would want me to do, to do that.

"Q. So that you did not want to get the reputation of handling coffee that had been damaged?

"A. That is the whole thing.

"Q. You wanted to get it out of here as soon as you could?

"A. That is it exactly.

"Q. Sort of save your reputation in the community?

"A. Yes, at least I tried to, and I tried to make anything honorable out of it. Now, talking about this thing here, I will tell you about a thing I had. I had 900 bags of coffee of the same nature and I lost $4,000 on it just six months before that on the same kind of a deal. I bought it and paid $4,000 out of my pocket on the same kind of a proposition.

"Mr. DENMAN. Q. Then such speculations are largely speculative in their nature?

"A. Yes. I lost the $4,000 in one transaction, on 900 bags of coffee.

"Mr. KNIGHT. Q. You felt you could get even on this shipment?

"A. I didn't feel sure, but I took the chance. You understand I am entirely out of this thing, either with the insurance company or Leege & Haskins, and I want to do the right thing; I don't care what way the case goes, because I am not interested in it at all" (Leege & Haskins Apostles, pp. 153-155).

The only excuse which appellees give for the indecent haste thus taken was fear of the condemnation of the coffees in question under the pure food laws (Leege & Haskins Apostles, pp. 34, 51, 54-57, 57-58, 138-139, 150). Examination, however, of these acts,

Penal Code of Cal., secs. 382-383b;

Act of the Legislature of Cal. of March 11, 1907 (Stats. 1907, p. 208);

Act of Congress of June 30, 1906 (34 Stats. at Large, p. 768),

shows that such fear was utterly groundless. They were passed to prevent the manufacture, sale or transportation of adulterated or misbranded foods, drugs and medicines; and in both the state and federal acts food is deemed to be adulterated

> "if any substance has been mixed or packed or mixed and packed with the food so to reduce or lower or injuriously affect its quality, purity, strength or food value * * * If it contains any added poisonous or other added deleterious ingredient."

These coffees were not subject to be condemned under any of these acts. They did not come within the inhibition contained in any of them; and, if they did, then all of the parties promoting these sales had committed an offense against the law and were punishable therefor by fine or imprisonment. These sales, then, are apparently defended on the ground that those who took part in them were justified in committing an offense against the law, providing they did it quickly and were not discovered in doing it. The law, however, never justifies the commission of crime for the purpose of minimizing the damage to anyone. If these coffees were by law unsalable, then they should not have been sold, and the ship should properly have been charged with the entire loss. If these coffees could have been thus condemned, then a violation of law was committed in order that a handsome profit might be made by a speculation at the ship's expense.

The action, however, of the parties directly concerned in these sales will bear deeper analysis, as the record

shows, especially in view of the admission which Mr. O'Brien makes before he leaves the witness-stand, that the pure food scare was not wholly responsible for the sale which was made to Lewin:

> "Q. Then the net result of your testimony is, as I understand it, that this scare really did not cut any figure in the price received in the sale to Lewin?
>
> "A. It did have some weight. Possibly it had weight. We had every reason to believe, and still believe, that the sale to Lewin was more that (than) a good one, for account of whoever it might concern.
>
> "Q. Well, if there had not been that scare would you have thought you ought to have got more from Mr. Lewin, or not? If you had never heard anything about that? Do you think you could have got more than five and a quarter cents? Or did you consider that you were getting all that the coffee was worth?
>
> "A. If we never had heard anything about it we would have recommended the sale to Lewin at five and a quarter cents.
>
> "Q. Then I don't see how you figure that that scare had any effect in the price obtainable.
>
> "A. It made us feel just that much more elated over the successful sale, as we construed it" (Leege & Haskins Apostles, pp. 57-58).

As before stated, in the Leege & Haskins and Schilling shipments, the sales were made for the account of certain insurance companies which had apparently paid the respective losses sustained by the shippers, and had taken over the coffees (Leege & Haskins Apostles, pp. 29, 30, 34, 37, 47, 48, 56, 119, 137, 164-165, 168, 178-179, 187). Claims had been made on the companies and recognized by the latter, on the ground that the damaged coffee was an actual or constructive total loss (Leege &

Haskins Apostles, pp. 34, 56). Witness O'Brien himself admitted that it was necessary for the consignees, according to the form of their insurance policies, to show that the coffee was a total loss (Leege & Haskins Apostles, p. 54); and, as their claims had been recognized by the local agents of the foreign insurance companies here, these agents were evidently anxious to justify their payment of these claims by showing that the coffee was not worth to exceed fifty per cent of the sound value, believing that they could recover from the steamer any discrepancy between such value and the price for which the coffees were actually sold. As a matter of fact these coffees were not a total loss, nor could they have been legally condemned. And so it coincidently appears that the Leege & Haskins coffees sold for just fifty per cent, i. e., 5¼ cents, of what was found to be their sound value, i. e., 10½ cents; and the Schilling shipment sold at the same time for a trifle less than fifty per cent, inasmuch as the sound value of that coffee was ascertained to be 11½ cents a pound. These facts are highly significant in view of the circumstances.

Fortunately, however, for the steamer, some evidence was afforded it of the real selling value of these coffees by the subsequent sale of the Brandenstein consignment, not conducted secretly and hastily, but in an open manner. O'Brien admitted that the sale to Lewin was a pure speculation on the latter's part (Leege & Haskins Apostles, pp. 56-57). It was abundantly established that there was a good legitimate market here for damaged coffees (Leege & Haskins Apostles, pp. 44, 45, 68-69; Schilling Apostles, pp. 45-46, 67, 68, 89-90, 93, 94-98),

and Cambron had not the slightest difficulty in reselling the coffee which he purchased.

Considerable of the record is taken up with testimony respecting the character of damage which the coffees in question suffered, i. e., from the fumes of creosote, which, it seems, would be to a great extent dispelled if the coffee were left open to the air, rather than kept tightly bottled or covered; but it must be borne in mind that the Brandenstein coffee which Cambron sold was a part of the same cargo, stowed in the same portion of the ship, and subject to the same fumes as the other coffees were, and, in fact, being somewhat lower in the hold than these other coffees, had commenced to sweat, thereby necessitating its discharge earlier than the master of the steamer had originally planned. No damage in these two cases can be asserted which was not also sustained by the Brandenstein coffee, and, therefore, the particular character of the damage which the coffees sustained becomes a negligible factor in the case. The sole question is, what were these coffees worth, whatever their condition may have been?

Appellees also endeavored to establish by O'Brien, who made both sales of the coffees in question as broker, by Lewin, the vendee at the first, and vendor at the second, of these sales, by Falkenham, his clerk, by another broker named Werlin, as well as by the consignees themselves, that the price obtained at the first of these sales, to-wit, 5¼ cents a pound, was a very good price for the coffee. An examination of the record, however, will show that all of these witnesses were

directly interested in the controversy, save Werlin, in minimizing the value of these coffees; and the consignees themselves disclaimed having much, if any, knowledge on the subject on the ground that they never knowingly handled coffees that had been damaged, and, therefore, were not acquainted with the condition of the market in that respect (vid., for instance, the testimony of Mr. Levinger, of Brandenstein & Company, Schilling Apostles, pp. 71, 77, 78, 79-80).

Appellant's complaint is that the manner in which the coffees in question were sold to Lewin did not furnish a fair indication of their value. If they had been sold in a public manner, on reasonable notice, or if claimant had been given an opportunity to have a voice in the disposition of the merchandise, no just criticism could have been made. Here, however, the sale was conducted in a most unusual manner. The pure food commission was played as the "bogie-man" to justify the quick sale and shipment of the merchandise out of the state, although no one was able to cite an instance where coffee similarly, or even worse, damaged had ever been destroyed.

If private sales of this character, made without the ship's knowledge, are to be justified on the testimony of the parties interested in making such sales that the merchandise was worth no more than the price obtained thereby, the carrier is at the mercy of the consignees to whom the goods have been delivered and is deprived of any opportunity of making its loss as light as possible either by purchasing the goods itself or finding a purchaser therefor.

We submit that the court should pay no attention to the testimony that 5¼ cents was the best price for which these coffees could be then sold, in view of the actual sale made by Cambron somewhat later, at an advance price. The men who participated in the sale complained of were too much interested therein to be impartial in their views. As the court said in the case of

The Richmond, 114 Fed. 208, 211:

> "No notice was given of the proposed experiments to the other parties in interest or their counsel. They were denied an opportunity to know as to the exact condition of affairs when the experiment was made, and, indeed, what was done and seen. At least notice ought to have been given, and an opportunity afforded those to be affected to be present before such testimony should be considered."

So, we contend here, that a public sale should have been held or at least notice of the intended sale to Lewin ought to have been gi[illegible] to the steamer, and an opportunity afforded i[illegible] take part therein, before testimony can be seri[illegible] considered by the court that the sale made was [illegible]e steamer's best interests, especially in view o[illegible] act that a subsequent sale at a higher figure [illegible]ively disclosed.

Th[illegible]rt will note the reasonableness of our position. As we have before stated, Cambron, who subsequently purchased the Brandenstein coffees, stated that the Santos coffee (which composed entirely the Leege & Haskins shipment and a large part of the Brandenstein shipment) was worth in this market, in sound condition, about 10 cents a pound, and had been damaged, when

removed from the ship, about twenty per cent. He said thereafter:

> "The variance in damage in the Santos coffee was very slight. The Santos coffee, I do not think, varied more, *in fact I demonstrated it by the sales that were afterwards made,* that the damage in the Santos coffee would not vary more than 5 or 6 per cent; in some slight case it might be 10 per cent."

In other words, the Santos coffee in its damaged condition was worth 8 cents a pound. We are, however, asking that the court establish its value at 6 cents a pound net at the time in question, as it is not clear that there were any expenses paid by Brandenstein & Co. in connection with the Cambron sale.

It is therefore respectfully submitted that the amount of the decree herein be reduced at least to the sum of $1,134.25, with interest thereon from January 30, 1907 (as found in the commissio[illegible]'s report herein), and costs hereof, and in th[illegible] Schi[illegible] jus[illegible]e to the sum of $579 with like interest and [illegible]osts.

[illegible]'nstan

CHARLES [illegible]ad ev[illegible]

EDWARD J. M[illegible]r,

SAMUEL KNIGHT[illegible] without

Proctors for [illegible]mony

No. 1821

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STEAMSHIP COMPANY (a corporation), claimant of the American steamship "Santa Rita", her tackle, apparel and furniture, and all persons intervening for their interests therein,

Appellants,

vs.

THOMAS HASKINS and MAX SCHWABACHER, partners doing business under the firm name of Leege & Haskins,

Appellees.

BRIEF FOR APPELLEES.

Applying to Case No. 1822 as well.

WILLIAM DENMAN,
Proctor for Appellees.

Filed this.....day of March, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

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BRIEF FOR APPELLEES.

Applying to Case No. 1822 as well.

This is an appeal from a decree of the District Court which confirmed the report of the commissioner to whom had been referred the matter of determining the injury to certain coffees. These coffees had been carried by the steamer "Santa Rita" from New York to San Fran-

cisco, and had been injured by fuel oil and fumes of the oil which had broken away early in the voyage and invaded the cargo tanks. The coffees had thus been twice through the tropics confined in tanks with the fuel oil gases.

All the testimony was taken *viva voce* before the commissioner and the sole question raised by the appeal is whether the commissioner's finding on the issue of fact as to the *amount* of injury to the coffees, which finding was sustained after careful argument and briefing in the District Court, should be set aside here.

No question is raised here as to the commissioner's finding of the *sound* value of the coffee, .11½ cents for the Schilling and .10½ cents for the Haskins shipment, and the only question is as to the finding of the damaged value in San Francisco, the port of delivery. This the commissioner found to be 5¼ cents in each case holding that the difference of one cent in the original value of the two shipments did not cut any appreciable figure in the value in their damaged condition.

The question then is, is there any evidence on which the commissioner could have reasonably found that 5¼ cents per pound was the damaged value of the coffee in San Francisco at the termination of the voyage. Even if there had been a conflict in the testimony the commissioner's finding could not be opened for it has been long established that his decision must be clearly against the evidence to be set aside in this court.

> "The question is not what the conclusion of this court should be on the testimony but whether the commissioner's report, sustained as it was, after full argument, by the District Court, *was so clearly erroneous* as to warrant us in setting it aside. The powers conferred upon a commissioner in admiralty causes are analagous to those of *masters in chancery* and his findings upon questions of fact depending upon conflicting testimony or upon the credibility of witnesses should not be disturbed unless clearly erroneous."
>
> *La Bourgoyne* (C. C. A.), 144 Fed. 781 at 783.

See also

> *Coastwise Transportation Co. v. Baltimore Steam Packet Co.,* 148 Fed. 837 (C. C. A.).

It is our contention that not only was 5¼ cents the damaged value of the coffee at San Francisco, at the time of the arrival of the "Santa Rita", but that no other finding could properly have been made.

I.

Evidence Supporting the Commissioner's Finding and the Decree of the District Court.

The evidence shows that the damaged coffees were nearly a week in the ship's possession on dock during which time the owners had abundant time to examine and sample them and determine the amount of their injuries. During that period the consignees settled with their insurance companies who took over the coffee. When the coffee was received by the insurance companies from the ship, there was an absolute delivery, no agreement being made with the ship that they would either hold or sell to the account of whom it may concern.

The insurance companies put the sale of the coffee in the hands of the long established firm of C. L. Bickford and Company, who offered it on the street and to all the large dealers, Folger, Hills, Schilling and others (Haskins case, page 34). As the quantity was very large the entire trade took a keen interest in it, and hence we were able to obtain a number of expert witnesses with personal knowledge of its condition. There were also introduced at the hearing samples upon which the experts and presumably also the commissioner in part based their opinions.

In all we offered seven expert opinions as to the value in San Francisco at the time of the arrival, some in the Haskins case and some in the Schilling case. Two of them were entirely disinterested, George Werlin, the broker, and Ben Levinger, an expert in the employ of

Brandenstein & Co., having no connection with any of the coffees consigned to Schilling or Leege and Haskins, though both had examined them. The other five were: O'Brien, the broker, who made fifty cup tests, Falkenham, who sampled every bag, Bickford, who was the head of the firm of brokers handling the coffee, Schilling, one of the consignees, and Lewin, an expert and dealer who purchased it. They testify as follows:

George Werlin, disinterested expert, says at pages 27 and 28 of the Schilling case:

"The coffee was damaged by what I call creosote.

Q. Was that odor perceptible?

A. Very strong.

Q. Would you recollect it if you were to encounter it again?

A. Yes, sir.

Q. Let me ask you to examine this sample.

Mr. KNIGHT. You will notice, Mr. Reporter, that the sample has been kept tightly corked, and was uncorked and immediately corked up again.

A. (After examination) That is the same odor.

Mr. DENMAN. Q. Now let me ask you if you will taste a bean of this coffee from Libelant's Exhibit No. 1 (handing).

A. (After examination) I find the same odor in this—the same taste as the odor shown in the other. The odor and the taste is the same thing anyway.

Q. What was the price that Mr. Lewin said that he paid for that coffee?

A. 5¼ cents.

Q. Do you consider that a fair value for coffee that is imported such as this?

A. No, I consider it an excessive price, and I so expressed myself at the time."

Ben Levinger, disinterested expert, says at pages 71 and 72 of the Schilling case:

"Would you say that 5¼ cents was a fair value for the coffee at the time of the arrival in port of the 'Santa Rita'?

A. If the coffee had been mine at that time I would have accepted the bid if I could have gotten it.

Q. Would you have considered that a fair price for it?

A. Yes, sir."

Mr. Schilling, consignee who had settled with insurers and hence was disinterested, at pages 40 and 41 of the Schilling case, testified as follows:

"Q. Would any reputable dealer in San Francisco that you know use such a coffee as that for roasting purposes?

A. No, sir.

Q. Is there any commercial purpose in San Francisco that you know of to which that coffee could be put?

A. No reputable purpose. A man might buy that coffee with the object of mixing it in with a lot of other coffee, and he would take his chances that the taste of the damage of the creosote would not be detected.

Q. Do you think he would be able to succeed?

A. No, sir.

Q. Would that be an honorable practice, to do that?

A. It certainly would not.

Q. Would 5¼ cents be a fair price for that coffee in January, 1907?

A. I think it would be a very high price.

Q. Do you think the coffee is worth that much?

A. No, sir."

J. O. Falkenham, who inspected every bag (pages 56 and 57) in the course of his duties, and did not know who owned the coffee (page 64), says at pages 60-61 of the Schilling case:

"Q. Would you consider 5¼ cents a pound a fair price for those damaged coffees that you examined?

A. I would consider that ample.

Q. You would consider that an ample price?

A. Yes.

Q. How long have you been in the coffee business?

A. 14 years."

O'Brien, a coffee broker who made over fifty roasting tests (31, 32, 38, 39), says at page 52 of the Haskins case:

"Q. You said 5¼ cents a pound was a fair price for that coffee when you sold it. Do you still hold that that was a fair price for the coffee, in that condition?

A. I do, most emphatically.

Q. Now taking into consideration the condition of the coffee market since that time, what is your opinion as to the price 5¼ cents for the coffee at that time?

A. It is my opinion that five cents could not be obtained for the coffee to-day."

"Mr. Bickford had had many years' more experience than myself, and he recommended that coffee to be sold. In fact it was with his knowledge and on his recommendation that the coffee was sold at five and a quarter cents." (O'Brien, p. 57.)

Lewin, coffee speculator, our opponents' witness, says at page 151 of the Haskins case:

"Q. How long have you been a coffee broker?

A. I have been in the coffee business for 25 years.

Q. Now let me ask you in view of your knowledge of this coffee, the information that you gained as an expert since them, and the history of the coffee and your general expert knowledge on coffees, do you think 5¼ cents was a fair price for the coffee at the time you purchased it?

A. By all means, I would not buy it today if that thing were repeated; I would not buy it by no means."

Against the opinion of these seven experts, the ship offers one witness, George C. Cambron. This gentleman admitted that he had never seen the Haskins or Schilling coffees. He had seen a sample which was not shown to have been made up generally from the coffee in question, and he finally admitted he knew very little about it (Haskins case, page 71). He bases his testimony entirely on the condition of the Brandenstein shipment which is not concerned here and was not shown to have been in the same hold of the "Santa Rita", and hence exposed to the same conditions as the coffees at bar. He testifies that the damaged value of the Brandenstein coffees *in September* was 6 cents. For a fair comparison with the coffees at bar we must deduct one per cent a month, or 7% for the cost of keeping the coffee from

January to September (Levinger, page 75), and consider what effect on the September market for the Brandenstein coffee the presence of the huge quantity of damaged Schilling and Haskins coffee would have had. It is apparent there is no great discrepancy in the valuations.

It is submitted that the seven expert opinions as to the value of the coffees in question at the date of arrival, outweigh the one expert opinion of the value of other coffee many months thereafter.

II.

A Sale at St. Louis, Two Thousand Miles Away, is no Criterion of Value at San Francisco, the Port of Delivery.

The coffees were sold by the insurance company to Mr. Lewin, a speculator. Mr. Lewin was told by the expert Werlin that he had been "stung" (Schilling case, page 26), and evidently concluded to pass his misfortunes to the shoulders of someone else. He re-bagged the coffee and shipped it out of the State to St. Louis, selling it to a St. Louis buyer for the "nigger" trade, for 6½ cents. His turn probably netted him nearly a cent a pound but it was common knowledge among the coffee experts that the unfortunate vendee has not been able to dispose of the coffee in December, 1908, nearly two years after (Haskins, page 35, 36).

However, whether or not the St. Louis buyer was, in the classic language of the coffee trade, "stung" or "soaked", it is clear law that the value at St. Louis, two thousand miles away, is no criterion of the value at the port of delivery.

Carver's Carriage by Sea, 4th Ed. §727;
Texas Ry. v. White, 80 S. W. 641;
Railway Co. v. De Shon, 39 S. W. 250.

Our opponent did not seriously oppose this contention in the court below. We do not believe that he does so here.

III.

The Shipment Out of the State to Evade Attacks Through the Pure Food Laws.

It is admitted by our opponents' brief that the coffees in question were edible, and hence that it was justifiable to attempt to sell them. It appears, however, that the insurance policies on the Brandenstein shipment were against *actual total loss* and that the Brandenstein Company could recover from its insurer only on the theory that the coffees were entirely unfit for consumption. The Brandenstein people started a movement to have them condemned on that ground.

Our opponent has shown that this would have been unsuccessful, but nevertheless, it would have consumed time and hurt the value not only of the Brandenstein coffee but of the Haskins and Schilling coffees as well.

The insurance companies therefore sold promptly to Lewin, not however, without first covering the whole San Francisco market, as we have before pointed out. The companies thereafter had nothing to do with the coffees, either in their resacking or their shipment out of the State.

Our opponents seem to find some extraordinary significance in the fact that the Schilling coffees were sold to Lewin for *almost* half and the Haskins coffees for half their market value. Yet the only policies shown were those against *actual total loss,* and a constructive total loss would have availed the shippers nothing.

Further it appears that the insurance companies had paid their policies, taken the coffee and were selling it for themselves. What earthly benefit they could have gained by depressing the price under half its sound value, or at all, is beyond our comprehension.

In conclusion, we submit that the commissioner's decision and the decree of the lower court are sustained by the opinions of the seven experts and should stand.

WILLIAM DENMAN,
Proctor for Appellees.